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# The Promises and Pitfalls of State Eyewitness Identification Reforms

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# The Promises and Pitfalls of State Eyewitness Identification Reforms

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*This article provides a comprehensive analysis of state-based eyewitness identification reforms, including legislative directives, evidentiary rules, and judicial interpretations of state constitutions as providing greater protection against the use of unreliable eyewitness evidence than the United State Supreme Court offered in its 1977 decision in* Manson v. Brathwaite. *While previous scholarship has included thorough consideration of a single state's eyewitness law, state-by-state analysis of a sub-issue in eyewitness law, and brief general surveys of state approaches to eyewitness reform, this article adds to the current body of scholarship with an in-depth evaluation of eyewitness identification law in states that have either rejected the federal constitutional test or have adopted other statewide measures to reduce the likelihood of wrongful conviction through eyewitness misidentification.*

*The analysis is based not only on examination of the texts of legislative directives and of the seminal state judicial opinions that scholars have cited previously as examples of state alternatives to* Manson, *but also on assessment of the subsequent application and qualification of those opinions, often in ways that have undermined the modest progress of the earlier decisions. This evaluation demonstrates that incremental, state-based reforms have been significantly less promising than the qualified praise they have received would suggest. For states that have expressed a commitment to assessing eyewitness evidence in accord with scientific developments, this article's exposure of the conceptual inadequacy of many states' measures, the inconsistent application of theoretically sound reforms, and, frequently, retreat from broad statements of dedication to the development of legal directives in harmony with scientific consensus, should serve as a caution and as an inspiration to do better. Ultimately, states should implement measures to ensure that law enforcement will conduct identification procedures in accord with best practices, and they should equip judges with the tools to prevent the use of unreliable eyewitness evidence in court.*

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## INTRODUCTION

In this article, I will analyze state constitutional alternatives to the federal due process standard for deciding the admissibility of eyewitness evidence and other state-based mechanisms for guarding against unreliable eyewitness identifications. It is widely accepted that eyewitness misidentification is a leading cause of wrongful conviction.[2] Nonetheless, it is unlikely that the United States Supreme Court will revisit anytime soon the framework it developed in the 1970s for evaluating eyewitness evidence in *Manson v. Brathwaite*,[3] despite decades of research demonstrating flaws in the federal test—and in the ways lower courts regularly apply it—that make it a poor mechanism for assessing the reliability of such evidence.[4] A 2012 Supreme Court decision, while not directly addressing the continued validity of the Court's old due process standard, adopted a narrow approach to determining whether due process arguments would be available at all as a potential instrument for excluding tainted eyewitness identifications.[5] In that opinion, the Court suggested that other safeguards, including constitutional rights to counsel and confrontation, state rules of evidence, and jury instructions, are the primary means of protecting defendants against imperfect identification evidence.[6] At the same time, a slowly growing number of state courts have rejected the federal approach in favor of ostensibly more protective state constitutional tests for analyzing eyewitness evidence, some state courts have implemented non-constitutional evidentiary safeguards, and some state legislatures have statutorily required law enforcement agencies to conduct identification procedures in ways that reduce the potential for error. Because of the low probability of the United States Supreme Court reforming the federal constitutional standard, state alternatives to that approach are the best hope for those facing the possibility of wrongful conviction based on eyewitness misidentification.

An analysis of the variety of state mechanisms for dealing with eyewitness identification evidence is also particularly salient at the moment in light of highly lauded recent decisions of the high courts of New Jersey and Oregon, which endorsed the use by judges and juries of the past several decades of scientific

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[2] *See, e.g.*, Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1275 (2005); Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1490–91 (2008); George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 100 (2011).

[3] Manson v. Brathwaite, 432 U.S. 98, 113–14 (1977).

[4] *See, e.g.*, Nicholas A. Kahn-Fogel, Manson *and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L. L. REV. 175 (2012) (summarizing social science research suggesting flaws in the federal test and cataloguing decades of federal judicial decisions applying the test in ways likely to lead to admission of unreliable eyewitness evidence) [hereinafter Kahn-Fogel, Manson *and Its Progeny*].

[5] *See* Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012).

[6] *Id.* at 728–29.

findings in assessing eyewitness evidence.[7] Drawing on New Jersey's example, the Supreme Court of Idaho has also directed judges to incorporate these findings into their adjudication of due process challenges to eyewitness evidence.[8] To the extent that other states' approaches fall short of these directives, this analysis may provide an incentive for judges and legislators in those states to make further reforms. Additionally, if states that have expressed a desire to improve on the federal standard have nonetheless fallen short in the formulation or implementation of their alternative norms, examination of the ways in which they have done so may sound a note of caution for decision-makers in jurisdictions like Oregon and New Jersey, spurring those interested in preventing wrongful conviction to ensure vigilant application of those states' sweeping new directives and to consider further refinements in the future.

Other articles have briefly surveyed the range of state approaches to eyewitness identification reform.[9] Some scholarship has included thorough analysis of a single state's rules and standards for eyewitness identification evidence,[10] and some has included state-by-state analysis of a single sub-issue within eyewitness law.[11] This article adds to the current body of research with an in-depth, comparative analysis of eyewitness identification law in states that have either rejected the federal constitutional test in interpreting their own constitutional requirements or have adopted other statewide measures to reduce the likelihood of wrongful conviction through eyewitness misidentification. My analysis is based not only on examination of the texts of legislative directives and of the seminal state judicial opinions that scholars have cited frequently as examples of state alternatives to *Manson*, but also on assessment of the subsequent application and qualification of those opinions, often in ways that have undermined the modest progress of the earlier decisions. This analysis reinforces the conclusion others have drawn that the piecemeal reforms adopted by several jurisdictions have been insufficient. It also demonstrates that several state-based incremental reforms have been significantly less promising than the qualified praise they have received would suggest. Finally, it provides a

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[7] *See* State v. Henderson, 27 A.3d 872 (N.J. 2011); State v. Lawson, 291 P.3d 673 (Or. 2012).

[8] *See* State v. Almaraz, 301 P.3d 242, 251–53 (Idaho 2013).

[9] In one of the more thorough analyses to date, Professor Sandra Guerra Thompson provides a six-page overview of state alternatives to the federal due process test and a two-and-a-half-page description of state approaches to expert testimony and jury instructions on eyewitness identification. Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 623–31 (2010).

[10] *See, e.g.*, Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645 (2006); Amy D. Trenary, State v. Henderson*: A Model for Admitting Eyewitness Identification Testimony*, 84 U. COLO. L. REV. 1257 (2013); Steven J. Joffee, Comment, *Long Overdue: Utah's Incomplete Approach to Eyewitness Identification and Suggestions for Reform*, 2010 UTAH L. REV. 443 (2010); Anne E. Whitehead, Note, State v. Ramirez*: Strengthening Utah's Standard for Admitting Eyewitness Identification Evidence*, 1992 UTAH L. REV. 647 (1992).

[11] *See, e.g.*, Vallas, *supra* note 2.

reassessment of the recent reforms the supreme courts of New Jersey and Oregon have adopted and of the resounding adulation that followed those decisions.

The various legal mechanisms for reducing the likelihood of wrongful conviction based on eyewitness misidentification are potentially interrelated. Even if a state supreme court has retained the unsound federal constitutional test for admissibility of eyewitness evidence in interpreting its own constitution, the flaws in that test might be mitigated if the judges who apply it are informed by detailed statutory provisions that describe the best ways to administer eyewitness identification procedures. And if such statutory provisions require law enforcement personnel to conduct identification procedures in compliance with scientifically supported best practices, then courts might be less likely to have to grapple with the constitutional admissibility of deeply tainted eyewitness evidence in the first place. On the other hand, in a state that has abandoned the federal due process test in favor of a more scientifically sound framework, judicial exclusion of evidence from faulty procedures might induce law enforcement personnel to adopt better practices even in the absence of a statutory mandate. Finally, effective use of jury instructions or regular admission of expert testimony about the kinds of factors that affect the reliability of eyewitness evidence might modestly reduce wrongful convictions, regardless of whether state courts continue to use the federal constitutional standard for assessing eyewitness evidence and even if neither the judiciary nor the legislature has required state law enforcement personnel to use the best methods for administering identification procedures.

In fact, my examination of cases in states that have adopted statutory or judicial reforms of eyewitness law reveals mixed results. On the negative side, among states that have interpreted their constitutions as requiring more stringent tests than the federal due process standard, those tests have often failed to provide the kind of guidance necessary to alert judges to the range of factors that can increase the odds of misidentification. Perhaps more disturbingly, even when courts in these jurisdictions have recognized the advantages of procedures psychologists have recommended to reduce misidentification, such courts have been reluctant to characterize failure to follow the recommended procedures as improper. As a consequence, even under these revised approaches, judges often approve of deeply unreliable identification procedures and neglect to consider conditions outside of police control that decades of scientific research has shown are likely to impact an eyewitness's ability to make an accurate identification. Furthermore, several states that have imposed statutory requirements concerning the methods law enforcement officers use to conduct identification procedures have failed to include any sanction, exclusionary or otherwise, for noncompliance. Therefore, those statutory requirements have tended to have a limited impact on the way judges evaluate eyewitness identification evidence. In fact, even in jurisdictions in which statutory provisions expressly require judges to take noncompliance with best practices into account in adjudicating suppression motions, failure to administer identification procedures according to statutory requirements and scientific recommendations has often had a relatively insignificant effect on judicial analysis. When eyewitness

statutes have required instructions informing jurors that they may take noncompliance into account in gauging the reliability of eyewitness evidence, those instructions have tended to be too vague to apprise jurors adequately of the reasons why noncompliance makes the evidence in question suspect. Furthermore, even the best instructions, and even admission of detailed expert testimony, have limited impact on jurors and are inadequate substitutes for suppression of tainted evidence.

This is not to suggest that state reforms have lacked any benefit or promise whatsoever. Several jurisdictions have approved the use of detailed instructions to assist jurors in gauging the value of eyewitness evidence when courts do not exclude it, and a number of state supreme courts have also instructed lower courts that expert testimony on the topic should generally be admissible.[12] Although these safeguards are less than ideal, they have some value. Additionally, examination of cases in at least one state that has statutorily directed police to use scientifically sound identification procedures reveals that, despite the failure of the judiciary to adopt effective safeguards against tainted evidence, in recent cases in which defendants challenged identification evidence, law enforcement personnel often had substantially complied with the statute's requirements.[13] Finally, the supreme courts of New Jersey, Oregon, and Idaho have adopted rules that should result in lower courts taking serious account of the broad range of factors that can affect the trustworthiness of eyewitness identification evidence.[14] If these states maintain their commitments to the principles their high courts recently championed, the cause of justice will be advanced. Ultimately, however, the record in other states that have made efforts at reform, coupled with analysis of the directives the high courts of New Jersey and Oregon issued, provides cause for only cautious optimism about the future of eyewitness identification law even in those states.

In Part I of this article, I will trace the development of constitutional eyewitness law by the United States Supreme Court. After holding for the first time in 1967 that eyewitness evidence must be suppressed in some cases as a matter of due process,[15] the Court articulated the current framework for assessing due process claims in 1977 in *Manson v. Brathwaite*.[16] Although the past four decades of psychological science and extensive analysis of actual cases applying *Manson* have thoroughly discredited that approach, the Court is unlikely to reform it in the near future. The vast majority of states have purported to follow *Manson* in interpreting their own constitutional requirements; those that have explicitly rejected *Manson* have developed alternative approaches in reaction to the perceived shortcomings of the federal directive.

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[12] *See infra* Part III.

[13] *See infra* notes 312–15.

[14] *See infra* Part III.F.

[15] *See* Stovall v. Denno, 388 U.S. 293, 301–02 (1967).

[16] Manson v. Brathwaite, 432 U.S. 98, 113–14 (1977).

In Part II, I will summarize the psychological science that has exposed the array of factors that can distort eyewitness memory and lead to misidentification. In Part III, I will analyze the various ways in which state courts and legislatures have deviated from the federal approach to eyewitness law. If these state innovations represent the greatest potential for protecting most criminal defendants against the possibility of misidentification, then a thorough review of the promises and pitfalls of these disparate methods is warranted. If there is wisdom to be gained from one or more of the legal directives under review, then states interested in enhancing the integrity of their justice systems might draw on models first developed in other jurisdictions, and, eventually, the United States Supreme Court might follow suit. As my analysis will reveal, there is still room for improvement in all of the states that have purported to provide enhanced legal protection against the risk of wrongful conviction through eyewitness misidentification.

## I. DEVELOPMENT OF CONSTITUTIONAL EYEWITNESS LAW

Until the latter half of the twentieth century, the general rule in the United States was that any problems with the quality of eyewitness identification evidence went to the weight, not the admissibility, of that evidence and that the jury bore the ultimate responsibility for assessing the credibility and reliability of an eyewitness's identification.[17] In a trilogy of landmark cases released on the same day in 1967, however, the Supreme Court ruled for the first time that the Constitution requires suppression of some identification evidence. In *United States v. Wade* and *Gilbert v. California*, the Court held that a post-indictment lineup is a critical stage in a criminal prosecution, and, unless the defendant waives his Sixth Amendment rights, defense counsel's absence from such a procedure requires suppression of evidence from the lineup.[18] The court also ruled, however, that even when the lineup evidence itself must be suppressed, a witness would be permitted to identify the defendant in court if the prosecution could prove the witness had an independent source for his identification.[19] The Court stated that the factors judges should evaluate in deciding the independent source question include:

> the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.[20]

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[17] *See* Simmons v. United States, 390 U.S. 377, 382 (1968).

[18] United States v. Wade, 388 U.S. 218, 236–38 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967).

[19] *Wade*, 388 U.S. at 240–42; *Gilbert*, 388 U.S. at 272.

[20] *Wade*, 388 U.S. at 241.

In *Stovall v. Denno*, the Court held that, regardless of whether a defendant's Sixth Amendment rights were implicated or violated, some identification procedures are "so unnecessarily suggestive and conducive to irreparable mistaken identification" that eyewitness evidence must be suppressed as a matter of due process.[21]

While the *Stovall* Court's language suggested that flawed identification procedures themselves might violate due process, the Court shifted its approach nine months later in *Simmons v. United States*, focusing in that case on the overall reliability of the identification evidence rather than merely the flaws in the identification procedure.[22] The *Simmons* Court emphasized the high quality of the witnesses' opportunities to view the perpetrator and their high levels of certainty in their identifications.[23] Ultimately, the Court concluded there was no due process violation in admitting the evidence because there was little doubt that the witnesses were actually correct in their identification of Simmons.[24] Scholars have frequently characterized *Simmons* as the beginning of the Court's unraveling of the robust protection it had offered in *Stovall*;[25] while *Stovall* provided a per se rule of exclusion for evidence derived from flawed procedures, *Simmons* rejected this categorical approach in favor of a reliability analysis that would often allow admission of eyewitness evidence even when an identification procedure was unnecessarily suggestive.[26] Consequently, some of the states that have rejected the Supreme Court's current due process test have explicitly modeled their rules on *Stovall*, based on the belief that it provides greater protection against the possibility of wrongful conviction through misidentification.[27] As I have discussed in previous

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[21] Stovall v. Denno, 388 U.S. 293, 301–02 (1967).

[22] *Simmons*, 390 U.S. at 385–86.

[23] *Id.* at 385.

[24] *Id.* at 385–86.

[25] *See, e.g.*, Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 123–24 (2006); Charles A. Pulaski, Neil v. Biggers*: The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1108–09 (1974); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 266–68 (1990–91); Dori Lynn Yob, Comment, *Mistaken Identifications Cause Wrongful Convictions: New Jersey's Lineup Guidelines Restore Hope, but Are They Enough?*, 43 SANTA CLARA L. REV. 213, 229–30 (2002); Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 786–87, 89 (2005); David E. Paseltiner, Note, *Twenty-Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 HOFSTRA L. REV. 583, 589–90 (1987). *But see* Ofer Raban, *On Suggestive and Necessary Identification Procedures*, 37 AM. J. CRIM. L. 53, 58–59 (2009) (arguing that unreliable identification evidence should be suppressed whether or not a challenged pre-trial procedure was necessary and that *Simmons* thus improved on *Stovall* by focusing in part on whether the evidence was reliable, rather than simply on unnecessary suggestion).

[26] *Simmons*, 390 U.S. at 385–86.

[27] *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1260–61 (Mass. 1995); State v. Dubose, 699 N.W.2d 582, 593–94 (Wis. 2005); *see also* People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981)

articles in analysis of cases applying *Stovall* in the months before *Simmons*,[28] and as I will discuss in detail below in the context of states that have adopted variations of the *Stovall* rule,[29] the notion that *Stovall*, without more, offers significantly enhanced security against misidentification is not supported by the evidence.

The Supreme Court reaffirmed its shift toward a reliability analysis, as opposed to a focus merely on problematic identification procedures, in 1972 in *Neil v. Biggers*.[30] The *Biggers* Court stated that, at least in a case in which the confrontation and trial had taken place before *Stovall*, identification evidence would be admissible, even if there had been an unnecessarily suggestive procedure, so long as the evidence was reliable under the totality of the circumstances.[31] To inform its reliability analysis, the *Biggers* Court articulated five factors it considered relevant to the inquiry:

> [(1)] the opportunity of the witness to view the criminal at the time of the crime, [(2)] the witness' degree of attention, [(3)] the accuracy of the witness' prior description of the criminal, [(4)] the level of certainty demonstrated by the witness at the confrontation, and [(5)] the length of time between the crime and the confrontation.[32]

The *Biggers* Court clearly proclaimed that the "likelihood of misidentification," rather than a suggestive procedure in and of itself, is what violates a defendant's due process rights.[33] However, the *Biggers* Court left open the possibility that per se exclusion of evidence derived from unnecessarily suggestive confrontations might be available to defendants whose confrontations and trials took place after *Stovall*.[34] Thus, the Court revisited the issue once more in 1977 in *Manson v. Brathwaite*.

The *Manson* Court made clear that the standard from *Biggers* would govern all due process challenges to eyewitness evidence, stating that judges should weigh the five factors against the "corrupting effect of the suggestive identification."[35] Ultimately, the Court affirmed that "reliability is the linchpin in determining the admissibility of identification testimony."[36] In rejecting the per se exclusionary rule, the Court acknowledged that such a rule would promote greater deterrence against

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(rejecting *Manson*'s reliability test in favor of per se exclusion of unnecessarily suggestive pretrial identification evidence, without explicitly invoking *Stovall*).

[28] Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4, at 192–93; Nicholas A. Kahn-Fogel, *Beyond* Manson *and* Lukolongo*: A Critique of American and Zambian Eyewitness Law with Recommendations for Reform in the Developing World*, 20 FLA. J. INT'L L. 279, 304–08 (2008) [hereinafter Kahn-Fogel, *Beyond* Manson].

[29] *See infra* Part III.

[30] Neil v. Biggers, 409 U.S. 188 (1972).

[31] *See id.* at 198–99.

[32] *Id.* at 199.

[33] *See id.* at 198.

[34] *See id.* at 198–99.

[35] Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

[36] *Id.*

the use of suggestive procedures,[37] and it noted a "surprising unanimity among scholars" that the per se approach was "essential to avoid serious risk of miscarriage of justice."[38] However, the Court concluded the cost to society of not being able to use reliable evidence of guilt in criminal prosecutions would be too high.[39] The *Manson* Court also made clear that its new standard would apply to both pre-trial and in-court identification evidence, thus resulting in a unified analysis of all identification evidence in the wake of suggestive procedures.[40] In contrast, the *Stovall* Court had not specified whether unnecessarily suggestive procedures would require per se exclusion of both pre-trial identification evidence and any in-court identification, or alternatively, whether witnesses who had viewed unnecessarily suggestive procedures might nonetheless be allowed to identify defendants in court after an independent source determination.[41]

Even before *Wade*, *Gilbert*, and *Stovall*, the role of misidentification by eyewitnesses in producing wrongful convictions was well established. In 1932, Edwin Borchard's *Convicting the Innocent* listed eyewitness error as "perhaps a major source" of wrongful convictions,[42] and, before that, Hugo Münsterberg's research as the head of Harvard's psychology laboratory had demonstrated the severe unreliability of eyewitness memory.[43] In *Wade* itself, the Court had acknowledged that "[t]he vagaries of eyewitness identification are well-known" and noted that "the annals of criminal law are rife with instances of mistaken identification."[44] Today, it is clear that misidentification by eyewitnesses remains a leading cause of wrongful conviction; among the 330 DNA exonerations to date,[45] more than seventy percent were initially convicted at least in part due to misidentification by an eyewitness.[46] Because DNA evidence is generally available in only a limited class of cases, it is clear these exonerations represent only the tip of the iceberg of wrongful convictions in the United States.[47]

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[37] *Id.* at 112.

[38] *Id.* at 111 (quoting United States *ex rel.* Kirby v. Sturgess, 510 F.2d 397, 405 (7th Cir. 1975).

[39] *Cf. id.* at 111–13 (discussing the potentially negative effect of a rigid per se exclusionary rule on the administration of justice).

[40] *See id.* at 106 n.9.

[41] *See* Rosenberg, *supra* note 25, at 265–66.

[42] EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE 367 (1932).

[43] HUGO MÜNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME 15–70 (1908).

[44] United States v. Wade, 388 U.S. 218, 228 (1967).

[45] *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT http://www.innocenceproject.org/cases-false-imprisonment (last visited Oct. 11, 2015).

[46] *Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification (last visited Oct. 11, 2015).

[47] Rape cases tend to be the only category of case likely to yield testable DNA evidence that can prove innocence definitively. Yet each year there are far more cases in which eyewitness evidence is likely to be crucial that do not involve sexual assault. In 2012, for example, Federal Bureau of Investigation statistics show there were more than four times as many reported robberies as forcible rapes in the

Since *Manson*, moreover, nearly four decades of psychological research has cast doubt on the efficacy of that standard for sorting reliable from unreliable evidence.[48] Analysis of federal cases applying *Manson* has reinforced that research and has demonstrated that courts using *Manson* rarely suppress eyewitness evidence in the wake of flawed procedures, and they often undermine even the limited probative value the standard might have if applied in conjunction with the teachings of eyewitness science.[49] The Supreme Court, however, has not responded to this science, and *Manson* remains the federal constitutional standard. The vast majority of states have also followed *Manson* in interpreting the requirements of their own constitutions.

Most recently, in 2012, the Supreme Court issued its opinion in *Perry v. New Hampshire*, ruling that due process concerns are not implicated when suggestive conduct arises outside the context of police-arranged identification procedures.[50] In so doing, the Court overruled precedent from the First,[51] Second,[52] and Sixth Circuits.[53] Although the narrow question presented in *Perry* did not give the Court the opportunity to revise the *Manson* test, the Court gave no indication that it was inclined to do so. On the contrary, the Court stressed that juries, rather than judges, should generally determine the ultimate reliability of evidence, and it argued that traditional safeguards built into the adversary system, like cross-examination, supported by constitutional rights to counsel and confrontation, prevent juries from giving undue weight to eyewitness evidence.[54] Finally, the Court noted that jury instructions, admission of expert testimony, and Federal Rule of Evidence 403 (and its state counterparts), can provide further protection against the dangers of unreliable eyewitness evidence.[55]

At the federal level, some courts have approved instructions that warn jurors to evaluate eyewitness evidence with caution and inform juries of some of the factors that might impact reliability.[56] Some courts have also favored the admissibility of expert testimony on the issue.[57] However, as I will discuss below, these instructions have tended to exclude detailed explanations of the wide array of variables likely to

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United States. *Crime in the United States 2012*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/12tabledatadecpdf (last visited Oct. 11, 2015).

[48] *See infra* Part II.

[49] *See* Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4.

[50] Perry v. New Hampshire, 132 S. Ct. 716, 720–21, 728 (2012).

[51] United States v. Bouthot, 878 F.2d 1506, 1516 (1st Cir. 1989).

[52] Dunnigan v. Keane, 137 F.3d 117, 128 (2d Cir. 1998).

[53] Thigpen v. Cory, 804 F.2d 893, 895 (6th Cir. 1986).

[54] *Perry*, 132 S. Ct. at 728–29.

[55] *Id.*

[56] *See, e.g.*, United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972).

[57] *See* Vallas, *supra* note 2, at 119–24.

affect eyewitness memory, and even expert testimony and the most detailed instructions are likely to be of only limited value.[58]

While Congress has not acted to require federal law enforcement agencies to use best practices in the administration of identification procedures, the Department of Justice has published guidelines urging law enforcement officers to use several scientifically approved techniques for conducting identification procedures.[59] However, the guide explicitly states that it is not a legal mandate and is not intended as a proposal of legal criteria for the admissibility of evidence.[60]

## II. THE SCIENCE OF EYEWITNESS IDENTIFICATION

At the time of *Manson*, eyewitness science was still in its incipient stages. Although scientists had documented problems with eyewitness memory since the early twentieth century, they had not yet developed research to reveal the range of variables that can reduce reliability in individual cases.[61] In the four decades since *Manson*, however, psychological experiments have conclusively established a wide variety of factors that affect the reliability of eyewitness memory.[62] That body of research has shown that the *Manson* factors are woefully incomplete. It has also undermined the validity of the factors the *Manson* Court did invoke to test reliability.[63] Scientists have generally classified the variables that impact the trustworthiness of eyewitness evidence as either estimator or system variables.[64] Estimator variables include all factors outside the control of law enforcement that impact eyewitness accuracy, including viewing conditions at the time of the crime, the nature of the crime itself, and psychological and physical characteristics of the witnesses and of the perpetrator.[65] System variables, on the other hand, are variables within the control of law enforcement, such as the administration and composition of identification procedures.[66]

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[58] *See infra* Part II.C.

[59] *See* U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 3, 9, 27–38 (1999), https://www.ncjrs.gov/pdffiles1/nij/178240.pdf.

[60] *Id.* at 2.

[61] *See, e.g.*, JAMES M. DOYLE, TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION 49–63, 83–99 (2005); *see also* Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4, at 183–84.

[62] *See* Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 5 (2009) [hereinafter Wells & Quinlivan].

[63] *See, e.g.*, *id.* at 9–18 (examining "the *Manson* reliability criteria in the context of the science that has emerged since *Manson*"); *see also* Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4, at 183–84.

[64] Professor Gary Wells first used these terms during the early stages of the development of the new wave of eyewitness science that began in the 1970s. *See* Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978).

[65] *See id.* at 1548–50.

[66] *See id.* at 1548, 1552–54.

### *A. System Variables*

Several decades of research has proved that the manner in which law enforcement officers construct and administer identification procedures has a profound effect on the accuracy of eyewitness memory.[67] This research has resulted in a variety of widely accepted recommendations to minimize the potential for misidentification. Among the most common research-based guidelines are blind administration of identification procedures, warning witnesses that the actual perpetrator might be absent from an identification procedure, ensuring suspects do not stand out from non-suspect fillers when witnesses view lineups and photo arrays, and recording witnesses' confidence immediately after they make identifications.

One of the most basic ways those who design identification procedures can reduce misidentification is to construct such procedures to ensure the suspect does not stand out from other participants in ways that suggest his identity to witnesses. Research has shown that witnesses are likely to engage in what scientists refer to as the "relative judgment process," comparing participants in a lineup or photo array to each other and choosing the person who most closely resembles their memories of the appearance of the criminal, whether or not the actual perpetrator is present.[68] If the suspect is the only person in a lineup or photo array who resembles witnesses' descriptions of the perpetrator, then witnesses are likely to choose that suspect, even if he is innocent.[69] Likewise, if the suspect stands out in any other significant way, it is likely to draw witnesses' attention to him and may suggest that police believe he is the perpetrator.[70] In some cases, this has involved using a mugshot photo of the suspect while using more neutral photos of fillers,[71] and in others it has involved a suspect being the only person in an identification procedure wearing prison clothing.[72] Thus, administrators of identification procedures should make

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[67] *See, e.g.*, DOYLE, *supra* note 61, at 49–63, 83–99.

[68] *See* Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications be Diagnosed in the Cross-Race Situation?*, 7 PSYCHOL. PUB. POL'Y & L. 153, 155 (2001); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 23 LAW & HUM. BEHAV. 603, 613–14 (1998) [hereinafter Wells et al., *Eyewitness Identification Procedures*]; Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 768–69 (1995).

[69] *See* David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 OR. L. REV. 263, 272 (2010); *see also* Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 632.

[70] *See* Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 630.

[71] *See, e.g.*, Milteer v. Baker, No. 96-3421, 1997 WL 415308, *4–5 (6th Cir. Jul 18, 1997) (affirming a grant of habeas relief in a case in which the habeas petitioner's photo was the only one in an array with mugshot identification numbers, he was the only person depicted with a beard, police told witnesses a suspect was in the array, and police showed at least one witness a separate, color photo of the petitioner).

[72] *See, e.g.*, Haliym v. Mitchell, 492 F.3d 680, 703–07 (6th Cir. 2007) (finding identification reliable despite unnecessarily suggestive lineup in which petitioner was the only person bandaged or wearing

sure the suspect is not the only participant who resembles the description of the perpetrator, and they should prevent the suspect from standing out in other significant ways.[73]

The most suggestive kind of identification procedure, a showup, involves police presenting only a single suspect to witnesses, who are asked merely to confirm or deny that that person is the perpetrator.[74] Unsurprisingly, given that a showup procedure necessarily communicates to the witness the identity of the person police suspect to be the perpetrator, research has demonstrated that the use of showup identifications can increase the odds of misidentification.[75] Nonetheless, although the *Stovall* Court acknowledged that showups had been "widely condemned," it approved the use of the procedure in that case, given the need for an immediate identification by a witness with an uncertain prognosis after incurring eleven stab wounds.[76] Since *Stovall*, courts around the country have regularly approved of the use of showups.[77]

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prison clothing); Shelton v. Dir. of Dep't of Corr., No. 3:08cv270, 2009 WL 790013, at *6 (E.D. Va. Mar. 23, 2009) (assuming, *arguendo*, that a photo array viewed by witness was unduly suggestive because only petitioner and one other participant wore orange jumpsuits, but finding witness's identification reliable).

[73] Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 630; *see also* Sonenshein & Nilon, *supra* note 69, at 272; Wells & Quinlivan, *supra* note 62, at 7.

[74] *See* Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 630.

[75] Some research has suggested that showups conducted within a few minutes of a crime are as reliable as lineups. *See* A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464 (1996) [hereinafter Yarmey et al.]. This may be due to the fact that the freshness of witness memory shortly after a crime balances out the corrupting effect of the suggestive procedure. *See* State v. Henderson, 27 A.3d 872, 903 (N.J. 2011). Nonetheless, two hours after an initial encounter, fifty-eight percent of witnesses failed to reject an innocent suspect, while only fourteen percent of those who viewed a lineup at the same time made the same error. Yarmey et al., *supra* note 75, at 464; *see also* Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 523, 523 (2003) (finding that showup procedures result in higher rates of misidentification in cases in which an innocent suspect resembles the perpetrator); Jennifer E. Dysart et al., *Show-ups: The Critical Issue of Clothing Bias*, 20 APPLIED COGNITIVE PSYCHOL. 1009, 1019 (2006) (finding that showups increase the likelihood that witnesses will base their identifications more on similar clothing between suspect and perpetrator than on similar facial features).

[76] Stovall v. Denno, 388 U.S. 293, 295, 302 (1967).

[77] *See, e.g.*, Johnson v. Dugger, 817 F.2d 726, 729 (11th Cir. 1987); United States v. Rice, 652 F.2d 521, 528 (5th Cir. 1981) (citing *Stovall* in noting that showups have been "widely condemned," but asserting that various exigencies, including the interest in rapid crime solution, can justify the use of showups); Rodriguez v. Artus, No. 07-CV-00185S(F), 2010 WL 1543857, at *17 (W.D.N.Y. Feb. 18, 2010) (quoting *Stovall* in noting that showups have been "widely condemned," but holding that exigent circumstances, including the need to quickly confirm the identity of a suspect or to release an innocent suspect, justify the use of showups); Self v. State, 537 S.E.2d 723, 726–27 (Ga. Ct. App. 2000) (upholding trial court determination that showup conducted three and one-half hours after crime was not unnecessarily suggestive); People v. Parham, No. 2-09-1219, 2011 WL 10102489, at *1, *6 (Ill. App. Ct. Sept. 30, 2011) (finding showup conducted twenty to twenty-five minutes after crime not unnecessarily suggestive); State v. Caine, 652 So. 2d 611, 613–14 (La. Ct. App. 1995) (finding showup at police station seven hours after crime not unnecessarily suggestive); State v. Wilson, 827 A.2d 1143,

Eyewitness scientists also agree that administrators of identification procedures should be blind, meaning that such administrators should be unaware of the identity of the suspect.[78] Because of the potential influence an administrator might have on the outcome, the gold standard for all scientific experimentation is to use blind administration.[79] This rule accounts for both deliberate interference with experimental results and the potential for unintentional, subconscious influences. Like any other experiment, an identification procedure involves a hypothesis: a law enforcement agency believes the suspect might be the actual perpetrator of the crime. The officers who conduct the procedure test that hypothesis by asking witnesses to see whether they recognize the criminal. It is likely that the vast majority of police officers who conduct identification procedures do so in good faith. Nonetheless, when those officers know the identity of the suspect, there is a risk they will inadvertently give witnesses subtle cues about their hypothesis.[80] Even signals as seemingly insignificant as a pause, a minute gesture, or the hint of a smile can influence witnesses, yet witnesses and administrators are unlikely to be aware that anything improper has occurred.[81]

Unsurprisingly, studies have shown that when the administrator of a lineup believes she knows the identity of the culprit, it influences witnesses' choices.[82] Even so, in the vast majority of jurisdictions around the country, the officers who administer identification procedures are familiar with the case and take no steps to shield themselves from knowing which participant in a lineup or photo array the witness is viewing at any given time.[83] With showups, of course, the very nature of the procedure entails both the officer and the witness knowing the identity of the

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1147–48 (N.J. Super. Ct. App. Div. 2003) (finding that showup identification of defendant while defendant was handcuffed in the back of a police car was not unduly suggestive); People v. Williams, 127 A.D.2d 718, 718 (N.Y. App. Div. 1987) (finding showup not unnecessarily suggestive); State v. Addai, 778 N.W.2d 555, 566–67 (N.D. 2010) (finding showup identification conducted between fifteen minutes and one hour after stabbing not unnecessarily suggestive).

[78] *See, e.g.*, Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 627–29.

[79] *See id.* at 627; *see also* ROBERT ROSENTHAL, *Studies of Experimenter Expectancy Effects*, *in* EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH 141–302, 367–79 (Irvington Publishers, Inc. 1976) (1966) (explaining the effect an experimenter's expectations can have on an experiment and highlighting the desirability of blind administration).

[80] *See* Wells & Quinlivan, *supra* note 62, at 7–8.

[81] *See id.* at 8.

[82] *See, e.g.*, Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1106–11 (2004); *see also* Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 940 (1999).

[83] *See* Keith A. Findley, *Reforming Eyewitness Identification Procedures to Enhance Reliability and Protect the Innocent*, *in* ADAPTING TO NEW EYEWITNESS IDENTIFICATION PROCEDURES: LEADING EXPERTS ON CHALLENGING TRADITIONAL PROCESSES AND INTEGRATING NEW TECHNIQUES 107–08 (2010); Melissa B. Russano et al., *"Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 355, 366–67 (2006); Sonenshein & Nilon, *supra* note 69, at 271; Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 627.

suspect. However, as previously mentioned, police in most jurisdictions still use the technique regularly.

Similarly, there is widespread agreement among psychologists that police should warn witnesses that the actual perpetrator might not be present and that witnesses should feel no pressure to make an identification.[84] These warnings reduce the likelihood that witnesses will use the relative judgment process to pick an innocent suspect by counteracting the natural inclination of witnesses to assume that, if police have asked them to view an identification procedure, the perpetrator must be among those present.[85] Police might overtly reinforce this inclination with explicit statements that they have a suspect, but even mere silence from police increases the odds that witnesses will choose an innocent suspect from a procedure at which the perpetrator is absent.[86] Research has demonstrated, however, that warnings reduce the likelihood that witnesses will identify anyone from a culprit-absent procedure without having an appreciable influence on the rate of correct identifications when the perpetrator is actually present.[87]

Eyewitness scientists also agree unanimously that police should take immediate statements of certainty from eyewitnesses when they make an identification.[88] Research has proven that eyewitness confidence is highly malleable. A suggestive identification procedure, or post-identification feedback, artificially inflates witnesses' certainty in the accuracy of their identifications.[89] In fact, such feedback inflates not only the witness's subsequent confidence, but also leads witnesses to remember having been more confident at the time of the earlier identification.[90] By recording certainty statements immediately, administrators can counter the inflationary effects of confirmatory comments from law enforcement officers, of the

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[84] *See, e.g.*, Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482 (1981); Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 629; *see also* Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283, 287–93 (1997).

[85] Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 629; *see also* Malpass & Devine, *supra* note 84, at 487; Steblay, *supra* note 84, at 287–93.

[86] *See* Malpass & Devine, *supra* note 84, at 487–89; *see also* Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 629–30.

[87] *See* Steblay, *supra* note 84, at 288–89; Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 629.

[88] *See, e.g.*, Sonenshein & Nilon, *supra* note 69, at 274; Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 635; Yob, *supra* note 25, at 225–26.

[89] *See, e.g.*, Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006); Jeffrey S. Neuschatz et al., *The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory*, 19 APPLIED COGNITIVE PSYCHOL. 435, 441 (2005) (describing effects of post-identification confirming feedback); Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 626; Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998); Wells & Quinlivan, *supra* note 62, at 12.

[90] *See, e.g.*, Wells & Bradfield, *supra* note 89, at 362; Douglass & Steblay, *supra* note 89, at 864–65.

witness's subsequent contacts with others involved in the case, and of a witness's likely increasing confidence in her identification as she sees the government continuing to build a case against the suspect through further investigation and prosecution.

Crucially, each of the measures I have discussed unequivocally reduces the chances of misidentification without significantly affecting the likelihood that witnesses will accurately identify the actual criminal when the perpetrator is present.[91] A variety of other practices also reduce the likelihood of misidentification. Scientists have recommended separating witnesses from each other during identification procedures to reduce the odds that they will influence each other's choices.[92] Scientists have also urged administrators to avoid presenting a suspect to any witness on more than one occasion.[93] To reduce the chances that a witness will choose an innocent suspect, scientists have also argued that police should include only one suspect at a time in any given procedure.[94] Additionally, police should construct lineups and photo arrays with adequate numbers of fillers.[95]

Finally, some experiments have suggested that presenting participants in identification procedures to witnesses sequentially, rather than simultaneously, can reduce the odds of misidentification.[96] With sequential presentation, witnesses are likely to compare each participant individually to their memories of the perpetrator, eliminating innocent participants rather than using the relative judgment process to compare all participants to each other and choosing the one who seems closest to the actual criminal.[97] However, while research suggests that sequential identification procedures produce fewer misidentifications, that same research shows that sequential presentation also results in fewer accurate identifications.[98] If the higher rate of accurate identifications for simultaneous lineups results only from guessing, then there would be no reason to recommend simultaneous presentation

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[91] *See* Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 627–36.

[92] *See, e.g.*, Kenneth A. Patenaude, *Preventing Misidentification by Utilizing New Techniques*, *in* ADAPTING TO NEW EYEWITNESS IDENTIFICATION PROCEDURES: LEADING EXPERTS ON CHALLENGING TRADITIONAL PROCESSES AND INTEGRATING NEW TECHNIQUES 67–68 (2010); O'Toole & Shay, *supra* note 25, at 117. *Cf.* Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May be Contagious*, 4 LAW & HUM. BEHAV. 323, 323–28, 333 (1980) (finding that witness recollection of identifying features is influenced by the recollections of other witnesses).

[93] *Cf.* Wells & Quinlivan, *supra* note 62, at 8 (noting the potentially suggestive influence of multiple presentations of the suspect).

[94] *See id.* at 7.

[95] Increasing the number of fillers decreases the odds that a witness will use the relative judgment process to identify an innocent suspect. Gary L. Wells, *Police Lineups: Data, Theory, and Policy*, 7 PSYCHOL. PUB. POL'Y & L. 791, 798 (2001). While scientists have not agreed on any "magic number" that should be required in all cases, many have suggested a minimum of five fillers. State v. Henderson, 27 A.3d 872, 898 (N.J. 2011) (quoting testimony from Professor Gary Wells).

[96] *See* Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 468 (2001).

[97] *See id.* at 468–69.

[98] *See id.* at 466, 468–69.

over sequential presentation.[99] Nonetheless, some scientists remain unconvinced that sequential presentation is the "active ingredient" leading to lower rates of misidentification in studies purporting to show that effect.[100]

Unfortunately, despite widespread scientific consensus about many of the system variables that impact reliability, the legal response to that science has been inadequate. Although the Supreme Court's eyewitness jurisprudence has referred to "unnecessarily suggestive" identification procedures,[101] the Court has provided very little guidance for lower courts on the kinds of techniques that increase the odds of misidentification. As a consequence, as I have catalogued in a previous article, federal courts applying *Manson* have regularly failed to recognize the problematic aspects of suggestive procedures.[102] As I will show in this article, even among states that have rejected *Manson* or that have passed legislation that might inform judicial analysis in applying *Manson*, courts regularly fail to characterize unreliable methods as unnecessarily suggestive.

### *B. Estimator Variables*

The *Manson* reliability factors represented the Supreme Court's attempt to address some of the estimator variables that impact the trustworthiness of identification evidence. Yet the reliability factors the *Manson* Court invoked are both flawed and incomplete. First, three of the five factors—opportunity to view, degree of attention, and confidence[103]—are largely subjective, self-reporting factors. As I have noted above, suggestion is likely to inflate a witness's certainty in her identification. Similarly, a witness exposed to suggestion is likely to have a subsequently inflated memory of the quality of her opportunity to view the perpetrator at the time of the crime and of the degree of attention she paid to the criminal at the time of the crime.[104] Thus, the *Manson* analysis has tended to create a sort of perverse feedback loop, in which the *Manson* factors seem to reinforce the reliability of the most suggestive procedures.[105]

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[99] *See id.* at 469.

[100] Roy S. Malpass et al., *Public Policy and Sequential Lineups*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 1, 5–6 (2009); *see also* Dawn McQuiston-Surrett et al., *Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory*, 12 PSYCHOL. PUB. POL'Y & L. 137, 163–64 (2006); Scott D. Gronlund et al., *Robustness of the Sequential Lineup Advantage*, 15 J. EXPERIMENTAL PSYCHOL.: APPLIED 140, 149 (2009).

[101] *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 110 n.10 (1977).

[102] *See* Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4, at 196, 211–12.

[103] *Manson*, 432 U.S. at 114.

[104] *See* Neuschatz et al., *supra* note 89, at 441; *see also* Wells et al., *Eyewitness Identifications Procedures*, *supra* note 68, at 626; Wells & Bradfield, *supra* note 89, at 361–62; Wells & Quinlivan, *supra* note 62, at 9–12; *see generally* Douglass & Steblay, *supra* note 89 (discussing research "on the integrity of an eyewitness's recollections *after* the line-up decision is made").

[105] *See* Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4, at 189.

Even in the absence of any suggestion whatsoever, the *Manson* factors bear a complicated relationship to accuracy. First, even with impeccable identification procedures, certainty bears only a moderately positive correlation with accuracy.[106] Yet people not educated about eyewitness science are likely to attach enormous significance to a witness's certainty.[107] When a witness has been exposed to suggestion, moreover, the witness's artificially altered self-assessment can destroy the diagnostic value a confidence inquiry might have had in the absence of suggestion.[108] And although the *Manson* Court referred to certainty "at the confrontation,"[109] courts applying *Manson* have regularly assessed confidence based on the witness's subsequent testimony, when suggestion, including the very geography of the courtroom, is likely to have inflated the witness's certainty artificially.[110]

Although suggestion does not tend to inflate some aspects of a witness's description of her opportunity to view, including the duration of the event and the distance between the witness and the perpetrator,[111] witnesses tend to overestimate the amount of time they had to view the criminal even without suggestion.[112] Finally, even without suggestion, a witness's degree of attention at the time of a crime relates to accuracy in ways that judges not trained in the science are unlikely to understand. A witness who pays a great deal of attention to a criminal's

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[106] *See, e.g.*, Robert K. Bothwell et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOL. 691, 691–93 (1987); Wells & Quinlivan, *supra* note 62, at 11–12 (describing a meta-analysis of laboratory studies showing that the correlation between certainty and accuracy could be as high as 0.41 among witnesses who made an identification). *See also* Commonwealth v. Gomes, 22 N.E.3d 897, 913 (Mass. 2015) (noting that research on the relationship "between eyewitness certainty and accuracy is complex and still evolving," and holding that "it is necessary to inform jurors of the "tenuous relationship"). *But see* State v. Henderson, 27 A.3d 872, 899 (N.J. 2011) (describing a special master's finding that "eyewitness confidence is generally an unreliable indicator of accuracy," but also noting the special master's acknowledgment of research suggesting that "highly confident witnesses can make accurate identifications 90% of the time").

[107] *See, e.g.*, Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979); Brian L. Cutler et al., *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41, 41, 53 (1988); Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 351 (1997); Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 620; Heather Sonnenberg, Note, *The Admissibility of Expert Identification Testimony in New York Courts According to* People v. Lee, 12 TEMP. POL. & C.R. L. REV. 231, 242 (2002).

[108] *See, e.g.*, Wells & Quinlivan, *supra* note 62, at 12 (describing the results of numerous studies).

[109] Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

[110] *See* Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4, at 201, 212; *see also* Commonwealth v. Crayton, 21 N.E.3d 157, 166 (Mass. 2014) ("Although the defendant is not alone in the court room, even a witness who had never seen the defendant will infer that the defendant is sitting with counsel at the defense table, and can easily infer who is the defendant and who is the attorney.").

[111] *See* Douglass & Steblay, *supra* note 89, at 864.

[112] Wells & Quinlivan, *supra* note 62, at 10; *Cf.* H. R. Schiffman & Douglas J. Bobko, *Effects of Stimulus Complexity on the Perception of Brief Temporal Intervals*, 103 J. EXPERIMENTAL PSYCHOL. 156, 158 (1974) (finding that the greater the complexity of a stimulus, the more likely an individual was to overestimate the length of time that he or she observed it).

particular facial features is likely to be better at describing those features, but worse at recognizing the criminal at an identification procedure.[113] On the other hand, a witness who has made a more global assessment of the criminal's face at the time of the crime is more likely to recognize the criminal later, but less likely to be able to give a detailed description of his features.[114]

Although there is some correlation between the accuracy of an identification and the consistency of a witness's description with the appearance of the suspect, that consistency is unlikely to be meaningful if the condition that made an identification procedure suggestive in the first place was that the suspect was the only participant who resembled the description of the perpetrator.[115] Finally, although the lapse of time between the crime and an identification procedure affects reliability, courts often consider days or even weeks to be relatively insignificant.[116] However, the research has shown that the most significant deterioration of a witness's memory occurs within hours of an event.[117]

In addition to problematic aspects of the *Manson* factors themselves, those factors are woefully incomplete. Since *Manson*, scientists have identified a large number of other variables important to any reliability inquiry. Research has shown, for example, that witnesses are significantly less likely to be able to identify a perpetrator whose race is different from that of the witness than a perpetrator of the same race.[118] The stressfulness of an event is also important, but, contrary to popular wisdom, highly stressful events tend to impair memory rather than to reinforce it.[119] Additionally, when a perpetrator brandishes a weapon during a crime, witnesses are likely to focus their attention on the weapon instead of the perpetrator and less likely to make accurate identifications afterward.[120] Numerous

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[113] *See* Wells & Quinlivan, *supra* note 62, at 10–11.

[114] *Id.* at 11.

[115] *See id.* at 13.

[116] *E.g.*, State v. Henderson, 77 A.3d 536, 546 (N.J. Super. Ct. App. Div. 2013) (finding trial judge's determination that two-week delay between crime and identification was "a "relatively short span" to be adequately supported by the evidence and upholding decision to admit eyewitness evidence).

[117] *See* Manson v. Brathwaite, 432 U.S. 98, 131 (1977) (Marshall, J., dissenting) (asserting that "the greatest memory loss occurs within hours after an event"); Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOL. 58, 65 (1985) (finding that the most substantial increase in misidentifications from target-absent photo arrays occurs two hours after initial confrontation); Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, THE CHAMPION, Nov. 2004, at 8, 10 n.14 (citing David C. Rubin & Amy E. Wenzel, *One Hundred Years of Forgetting: A Quantitative Description of Retention*, 103 PSYCHOL. REV. 734 (1996)).

[118] *See* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & LAW 3, 21 (2001).

[119] *See, e.g.*, Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 687, 699 (2004).

[120] *See* Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 413, 415–17 (1992) (finding a decrease in eyewitness accuracy by about 10 percent when a weapon is present).

other variables not included in the *Manson* factors also impact reliability.[121] Even though the *Manson* Court itself described its reliability factors as merely guidelines in a totality-of-the-circumstances analysis,[122] in practice, courts applying *Manson* rarely go beyond those factors.[123] As I will discuss below, with notable exceptions, even states that have rejected *Manson* have failed to guide judges on the range of variables that should inform analysis of the reliability of identification evidence. Overall, then, even among jurisdictions that have made efforts to reform their eyewitness law, judges have given insufficient weight to both the police techniques that reduce accuracy and the factors outside the control of law enforcement that impact reliability.

### *C. Alternatives to Suppression: Jury Instructions and Expert Testimony*

Given the low likelihood of suppression under *Manson*, scientists have also examined the efficacy of measures designed to educate jurors tasked with evaluating eyewitness evidence. In particular, researchers have devoted attention to the potential benefits of jury instructions and expert testimony on the factors that impact the reliability of eyewitness evidence. First, scientists have demonstrated the need to educate jurors by showing that lay people tend to assess eyewitness evidence based on factors that have little or no relationship to actual reliability.[124] To the extent that jury instructions and expert testimony can counter these tendencies, the failure of courts to suppress unreliable evidence may be less problematic. Unfortunately, however, the jury instructions that federal courts commonly issue fail to include sufficient detail to apprise jurors of the range of factors that affect reliability. Furthermore, available evidence suggests that even the best instructions and detailed expert testimony have limited potential to influence juror decision-making.

First, a jury instruction without a detailed explanation of the kinds of factors that impact reliability is unlikely to counter jurors' tendencies to use unsound reasoning in assessing the evidence. The model instruction from *United States v. Telfaire*,[125] which has become the most widely-adopted instruction on the issue,[126]

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[121] *See, e.g.*, *Henderson*, 27 A.3d at 906–10 (discussing the effects of witness and perpetrator characteristics including age, influences from private actors, and the speed with which a witness makes an identification).

[122] *Manson*, 432 U.S. at 113–14.

[123] *See Henderson*, 27 A.3d at 919.

[124] *See generally* Devenport et al., *supra* note 107, at 348–52 (discussing studies showing juror insensitivity to estimator variables that reduce reliability and over-reliance on witness confidence and memory for peripheral details, the general tendency of jurors to overestimate eyewitness accuracy, and the inability of jurors to apply commonsense knowledge concerning lineup suggestion to the facts of cases they decide).

[125] United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972).

[126] Derek Simmonsen, Comment, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1070 (2011) (citing

deals primarily in generalities concerning the witness's opportunity and capacity to view the perpetrator and potential suggestion in the identification procedure.[127] Aside from noting that a procedure in which the witness picks the defendant from a group of similar individuals is generally superior to a showup,[128] the *Telfaire* instruction includes no guidance on the kinds of variables that reduce the reliability of identification procedures, and it contains no reference to most of the estimator variables scientists have since identified as important to reliability determinations. Unsurprisingly, mock jury studies have shown the *Telfaire* instruction to be ineffective as a safeguard against misidentification.[129]

Yet there are reasons to believe that even the most detailed instructions might be insufficient to cause jurors to incorporate fully the results of scientific research into their decision-making. A cautionary instruction buried in a comprehensive charge might be lost on jurors who have been through a long, tiring trial, and it could be insufficient to counter the prejudicial effects of eyewitness testimony jurors have heard significantly earlier in the process.[130] Some research has shown that detailed jury instructions on eyewitness evidence can be effective at least in reducing the number of pre-deliberation verdicts, suggesting that such instructions cause jurors to exercise greater caution in their assessment of the evidence.[131] Nonetheless, this research has not demonstrated superior outcomes with detailed instructions, and leading scientists have concluded that it remains an "open question" whether detailed instructions can have a significant impact on juries.[132] Moreover, it is possible to extrapolate from the results of research on the efficacy of expert testimony to conclude that detailed instructions might have similarly limited value.

The use of expert witnesses to inform jurors of the pitfalls of eyewitness identification could ameliorate the problems of jurors paying insufficient attention to eyewitness instructions that are part of a much larger charge and of such instructions being insufficient to counter prejudicial testimony jurors heard at a much earlier time. Furthermore, research on the use of experts suggests that expert testimony can increase juror sensitivity to the significance (or lack thereof) of factors such as eyewitness confidence, violence, and weapon focus.[133] However,

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Tanja Rapus Benton et al., *On the Admissibility of Expert Testimony on Eyewitness Identification: A Legal and Scientific Evaluation*, 2 TENN. J.L. & POL'Y 392, 422 (2006)).

[127] *See Telfaire*, 469 F.2d at 558.

[128] *Id.*

[129] Wells & Quinlivan, *supra* note 62, at 20 (citing BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 255–64 (1995)).

[130] *See* Peter J. Cohen, *How Shall They be Known?:* Daubert v. Merrill Dow Pharmaceuticals *and Eyewitness Identification*, 16 PACE L. REV. 237, 272 (1996).

[131] *See* Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 783 n.234 (2007) (citing CUTLER & PENROD, *supra* note 129, at 257).

[132] Wells & Quinlivan, *supra* note 62, at 20–21.

[133] *See* Devenport et al., *supra* note 107, at 356.

experiments with mock juries have also shown that such testimony does not enhance juror sensitivity to variables related to the suggestiveness of identification procedures.[134] While not directly applicable to the efficacy of jury instructions, this research might also suggest a likelihood of similarly limited value of detailed instructions. Ultimately, both expert testimony and detailed jury instructions may have some limited value in helping juries more skillfully gauge the reliability of eyewitness testimony. Nonetheless, the available data suggest that neither of these devices is sufficient to counter the range of intuitive, yet incorrect, ideas that jurors have about eyewitness evidence.

## III. STATE APPROACHES TO EYEWITNESS LAW

As noted above, state-based eyewitness identification reform has taken several basic forms. First, although the vast majority of jurisdictions have followed *Manson*, a few states have explicitly rejected *Manson* in interpreting the due process requirements of their own constitutions. In *Manson*'s place, these states have crafted a variety of norms that their respective supreme courts believed would better protect against the use of suspect identification evidence. Second, some state supreme courts have taken steps to ensure that juries will have the tools to evaluate eyewitness evidence adequately when judges decline to suppress it; a small number of jurisdictions have required detailed instructions to advise jurors of the ways system and estimator variables can influence the accuracy of eyewitness evidence, and some have expressed a preference for the admissibility of expert testimony on the issue. Finally, some states have enacted statutory mandates that law enforcement personnel conduct eyewitness identification procedures in ways that are consistent with scientific discoveries about the most reliable ways to administer such procedures.

My analysis will focus on both the textual content of judicial and legislative directives and on the ways those directives have influenced courts examining the admissibility of eyewitness identification evidence. Because of the multiplicity of state approaches to eyewitness identification reform, including a variety of constitutional tests, a range of judicially imposed evidentiary protections, disparate statutory provisions, and an array of combinations of such reforms, much of my analysis will be state by state rather than organized according to categories of reform. As I have noted, the various kinds of measures a state might adopt, judicially or legislatively, are potentially interrelated. Given the qualitative nature of my analysis in this article, it would be impractical to assess the consequences of only one type of reform if a state has attacked the problem of eyewitness error in more than one manner and if some of the approaches the state has adopted are unique. On the other hand, when more than one state has taken essentially the

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[134] *Id.* at 357.

same overall approach to eyewitness identification law, I will analyze those jurisdictions collectively.

I will conclude my examination of state approaches to eyewitness identification law with a brief discussion of the recent reforms the New Jersey and Oregon supreme courts have adopted. The decisions in New Jersey and Oregon have justifiably received a great deal of praise,[135] and there is much merit to the notion that these opinions should serve, at least to some extent, as models for other states. My analysis confirms that this is true not only for states that have retained the *Manson* standard and failed to implement other reforms, but also for states that have both rejected *Manson* and endorsed other safeguards to protect against wrongful conviction through misidentification. Nonetheless, examination of the opinions from New Jersey and Oregon reveals reason for apprehension about the future of eyewitness law, even in those states. Furthermore, the shortcomings of the incremental improvements and halfhearted refinements other states have espoused should qualify the excitement with which advocates and scholars have received the New Jersey and Oregon reforms. The experience of other states reveals the extent to which the initial promise of appealing reforms has been offset by subsequent reluctance to embrace the full implications of previous pronouncements on the manner in which eyewitness identifications should be conducted and assessed.

### *A. Massachusetts/New York*

Massachusetts and New York each have taken steps to reduce the likelihood of wrongful conviction through eyewitness misidentification. Most prominently, each state has rejected *Manson* in favor of an ostensibly more protective rule for determining the admissibility of suspect evidence. The Massachusetts Supreme Judicial Court has also required state law enforcement personnel to conduct some identification procedures using certain scientifically established protocols for reducing error. Furthermore, each state has taken some measures to inform jurors

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[135] *See, e.g.*, Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 493 (2012) (describing *Henderson* as providing "an important model" with its "social science framework for admissibility of eyewitness identifications"); Barry Scheck, *Four Reforms for the Twenty-First Century*, 96 JUDICATURE 323, 334 (2013) (describing the New Jersey and Oregon decisions as "landmark decisions" that have "provided a blueprint for state courts to re-evaluate and revise their legal architecture for the assessment and regulation of eyewitness testimony"); Trenary, *supra* note 10, at 1261; Dana Walsh, Note, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 36 B.C. INT'L & COMP. L. REV. 1415, 1415 (2013) (arguing that "[o]ther states should follow New Jersey's lead and adopt a similar approach"). *But see* Carla Jones, *A New Age of Eyewitness Identification Evidence in Light of Modern Scientific Research: Why* State v. Henderson *Does Not Significantly Alter the Management of Eyewitness Identification Evidence*, 44 RUTGERS L.J. 511, 513–14 (2014) (arguing that *Henderson* provides insufficient protection against unreliable evidence because it continues to rely on "suggestiveness" as a necessary threshold for judicial gatekeeping and because the court's prescribed reliability analysis offers inadequate deterrence against the use of suggestive identification techniques).

of the considerations that impact the reliability of eyewitness evidence. Nonetheless, as my analysis will show, the steps these states have taken have been inadequate.

The high courts of Massachusetts and New York have each interpreted their constitutions as requiring a *Stovall*-like rule of per se exclusion of evidence from unnecessarily suggestive pre-trial identification procedures. *Stovall*, in fact, explicitly inspired the Supreme Judicial Court of Massachusetts as it explained its ruling in *Commonwealth v. Johnson* as a decision to follow the United States Supreme Court's earlier framework for dealing with the issue, rather than the *Manson* standard.[136] In *People v. Adams*, the New York Court of Appeals adopted the same per se exclusionary rule for unnecessarily suggestive pre-trial identification procedures.[137] Intuitively, this approach may appear to provide significantly greater protection against the use of unreliable evidence than *Manson*; if courts must exclude all evidence from unnecessarily suggestive identification procedures, rather than balancing the corrupting effects of such procedures against a set of reliability factors, the result should be the exclusion of more evidence of questionable reliability and greater deterrence against the use of unsound identification techniques by police. In fact, just as those writing about the federal standard have often criticized *Manson* as dismantling the protection offered by *Stovall*, others have praised Massachusetts and New York as offering a superior alternative to the federal directive.[138] Yet a closer examination of the implications of *Stovall* calls this conclusion into question.

There are at least two reasons to suspect that a *Stovall*-like rule is insufficient to prevent the introduction of evidence derived from tainted identification procedures. First, *Stovall* itself provides almost no guidance to courts on the kinds of procedures that are likely to lead to misidentification in the first place.[139] Thus,

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[136] Commonwealth v. Johnson, 650 N.E.2d 1257, 1260–61 (Mass. 1995).

[137] *See* People v. Adams, 423 N.E.2d 379, 383–84 (N.Y. 1981).

[138] *See, e.g.*, Martinis M. Jackson, Note, *Timely Death of the Show-Up Procedure: Why the Supreme Court Should Adopt a Per Se Exclusionary Rule*, 56 HOW. L.J. 329, 351–55 (2012); John T. Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsylvania Eight*, 12 WIDENER L. REV. 359, 429–30 (2006) (citing Massachusetts' per se exclusionary rule for unnecessarily suggestive identifications as an example of "perfectly reasonable thinking" that "Pennsylvania would be well served to follow"); Calvin TerBeek, *A Call for Precedential Heads: Why the Supreme Court's Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with the Empirical Reality*, 31 LAW & PSYCHOL. REV. 21, 50 (2007) (citing *Johnson* and *Adams* in claiming that Massachusetts and New York are among the "more empirically-minded state supreme courts" that have rejected *Manson*); *But see* Matthew Gordon, Note, *Is New York Achieving More Reliable and Just Convictions when the Admissibility of a Suggestive Pretrial Identification is at Issue?*, 29 TOURO L. REV. 1305, 1330–31 (2013) (questioning the superiority of New York's per se exclusionary rule for unnecessarily suggestive pre-trial procedures and noting that under both the New York and federal approaches, an identification in some form might be allowed notwithstanding an unnecessarily suggestive procedure).

[139] *See* Stovall v. Denno, 388 U.S. 293, 302 (1967). The *Stovall* Court acknowledged that showing a suspect singly to a witness for identification had been "widely condemned," but the Court has never

courts relying on *Stovall* alone may be unlikely to recognize the problems that should lead to a conclusion that a procedure was unnecessarily suggestive and subject to exclusion. Second, although the *Stovall* Court did not address the issue,[140] state courts that have modeled their rules on *Stovall* have allowed for the possible admission of in-court identification testimony even when unnecessarily suggestive procedures require the suppression of pre-trial identification evidence.[141] Permitting an eyewitness to make an in-court identification severely diminishes any potential deterrent value such a rule might have against the use of unreliable pre-trial identification procedures by law enforcement personnel.

As I have noted in previous articles, the inability of courts to recognize suggestive procedures was evident in the application of *Stovall* in the nine months between that decision and the Court's shift in focus away from per se exclusion in *Simmons*.[142] During that period, courts interpreting *Stovall* regularly found that blatantly unsound procedures were not unnecessarily suggestive. Among the thirty-one cases available on Westlaw in which state courts cited *Stovall* in evaluating due process challenges to eyewitness evidence between *Stovall* and *Simmons*,[143] courts found not unnecessarily suggestive the identification of a woman from a lineup in which the three other participants were men;[144] a witness's identification of defendants at a showup at which the defendants were the only black men in the room and were accompanied by a white police officer;[145] the identification of the defendant at a showup in an interrogation room after watching police officers interrogate the defendant;[146] a showup identification at a police station seven days after the crime;[147] an identification in which the witness conceded a prosecutor might have said, "The next man the police bring through that door will be the man in those pictures," before the witness made the identification;[148] a showup in a case in which a police officer told the witness, "We got him," before the witness

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addressed other unreliable practices that might render an identification procedure unnecessarily suggestive. *Id.*

[140] Rosenberg, *supra* note 25, at 265–66.

[141] *See, e.g.*, *Johnson*, 650 N.E.2d. at 1260 (allowing in-court identification evidence if the prosecution can prove an independent source by clear and convincing evidence); *Adams*, 423 N.E.2d at 382 (upholding trial court's determination that in-court identification evidence had an independent source).

[142] Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4, at 192–94; Kahn-Fogel, *Beyond* Manson, *supra* note 28, at 304–08.

[143] Of eighty-seven state cases available on Westlaw that cited *Stovall* between the date of that decision and the Court's decision in *Simmons*, thirty-one considered directly whether admission of eyewitness evidence constituted a due process violation under *Stovall*. Kahn-Fogel, *Beyond* Manson, *supra* note 28, at 306–07.

[144] State v. Batchelor, 418 S.W.2d 929, 933–34 (Mo. 1967).

[145] People v. Brown, 229 N.E.2d 192, 194 (N.Y. 1967).

[146] Commonwealth v. Choice, 235 A.2d 173, 174 (Pa. Super. Ct. 1967) (Hoffman, J., dissenting).

[147] State v. Hill, 419 S.W.2d 46, 47–49 (Mo. 1967).

[148] Fogg v. Commonwealth, 159 S.E.2d 616, 621 (Va. 1968).

identified the defendant;[149] an identification preceded by a police officer's announcement to the eyewitness that "[w]e got the man";[150] a lineup in which four of six participants were suspects;[151] and a lineup at which an officer told witnesses a suspect was present.[152]

These cases demonstrate that mere adoption of a per se exclusionary rule is insufficient without scientifically supported guidance on the kinds of conduct that increase the odds of misidentification. In some of the above cases, particularly those involving statements by law enforcement officers affirming the presence of a suspect at an identification procedure, the deciding courts were operating based on the common sense notion that such conduct would have little impact on witnesses and without the benefit of the later research that would disprove that intuitive conclusion. Nonetheless, my previous catalogue of all federal cases on Westlaw dealing with the *Manson* standard between 1977 and January of 2010 shows that courts applying that standard have also regularly found tainted procedures not unnecessarily suggestive, and they have continued to do so despite the steady accretion of new psychological studies showing precisely the kinds of procedures that increase the chances of misidentification.[153]

Even so, one might expect that a court that has both the benefits of modern science and the demonstrated desire to improve on the *Manson* test might consistently and accurately label procedures unnecessarily suggestive when those procedures both make misidentification more likely and have no countervailing advantages. However, evaluation of recent decisions by courts applying a *Stovall*-like exclusionary rule demonstrates that even with the availability of unequivocal scientific proof that a technique increases the odds of misidentification, and without any clear reason why a more reliable approach would have been impractical under the circumstances, judges in modern *Stovall* jurisdictions still often find that shoddy procedures are not unnecessarily suggestive.

An examination of recent Massachusetts cases available on Westlaw that cited *Johnson* exposes the nature of the problem as well as the potential for improvement in the future. Promisingly, the Supreme Judicial Court has taken note of some of the safeguards scientists have recognized as crucial to reducing eyewitness misidentification without impairing the ability of eyewitnesses to make accurate identifications when the actual perpetrator is present. Inspired by the 1999 United States Department of Justice guidelines, the court in *Commonwealth v. Silva-Santiago* stated that in "nearly all circumstances" it expected police conducting future photo arrays to warn witnesses the perpetrator may not be present in the array and to ask each witness to state at the time of the identification his level of

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[149] People v. Harris, 236 N.E.2d 281, 282 (Ill. App. Ct. 1968).

[150] State v. Blevins, 421 S.W.2d 263, 265 (Mo. 1967).

[151] Burton v. State, 437 P.2d 861, 863 (Nev. 1968).

[152] Calbert v. State, 437 P.2d 628, 628–29 (Nev. 1968).

[153] Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4, at 209–16, 221–25.

certainty in the accuracy of the identification.[154] This pronouncement seems to have had a real impact on the way at least some police departments in Massachusetts conduct identification procedures. In recent Massachusetts cases citing *Johnson*, for example, courts have noted that police officers conducted identification procedures in accordance with the protocol the *Silva-Santiago* court established.[155]

To date, however, *Silva-Santiago*'s effect on judicial analysis of challenged evidence has been inadequate to protect against the use of unreliable identification techniques. This is largely attributable to the *Silva-Santiago* court's determination that, at least for the time being, failure to follow its protocol would not require judges to find the identification evidence impermissibly suggestive and inadmissible.[156] In *Silva-Santiago* itself, the court ruled that the identification procedures were not unnecessarily suggestive, despite the failure of law enforcement in that case to warn witnesses the perpetrator might not be present in a photo array.[157] Since then, the court has reiterated that noncompliance with the *Silva-Santiago* protocol should not automatically result in suppression of pre-trial identification evidence.[158] In *Commonwealth v. Watson*, the court noted that the trial had taken place before its ruling in *Silva-Santiago*; the court also restated the generally limited scope of the holding in the earlier case, emphasizing that the court had declined to require suppression as a consequence of failure to follow the procedures it prescribed.[159] Ultimately, the *Watson* court decided that "[a]lthough it would have been better" if the officer administering a photo array had not told the witness a suspect's photo was included, "that statement did not render the identification procedure impermissibly suggestive."[160] Most recently, in 2014, the Massachusetts Supreme Judicial Court held that an identification procedure is not necessarily impermissibly suggestive when a police officer tells a witness a suspect matching the witness's description is present.[161] Citing earlier opinions, the court diminished the significance of such statements, and of its own holding in *Silva-*

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[154] Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 312 (Mass. 2009).

[155] Commonwealth v. Caldwell, No. 11-P-1834, 2014 WL 1343283, at *1 (Mass. App. Ct. Apr. 7, 2014) (noting that lineup conducted several months after crime was administered according to the *Silva-Santiago* protocol); Commonwealth v. Gray, No. BRCR2009-00583, 2011 WL 2517423, at *4 (Mass. Super. Ct. June 13, 2011) (observing that officers administering a photo array communicated the substance of the *Silva-Santiago* protocol to the witness).

[156] *See Silva-Santiago*, 906 N.E.2d. at 312–13.

[157] *Id.* at 311–13.

[158] Commonwealth v. Watson, 915 N.E.2d 1052, 1058 (Mass. 2009).

[159] *Id.* In another case, the Supreme Judicial Court addressed more specifically how it would assess identification procedures conducted before the *Silva-Santiago* decision. In *Commonwealth v. Walker*, the court stated that detectives in the case "cannot be faulted" for failing to follow *Silva-Santiago* because that decision was issued after they conducted the identification procedure. Commonwealth v. Walker, 953 N.E.2d.195, 205–06 (Mass. 2011).

[160] *Watson*, 915 N.E.2d at 1059.

[161] *See* Commonwealth v. Meas, 5 N.E.3d 864, 873 (Mass. 2014).

*Santiago*, by observing that witnesses generally expect a suspect to be present at an identification procedure in any case.[162] These cases reveal the extremely limited effect on judicial analysis of police failure to follow the *Silva-Santiago* protocol.

Furthermore, the Supreme Judicial Court has provided no requirement at all that police follow other scientific guidelines for administering identification procedures. In *Silva-Santiago*, the court acknowledged that blind administration of identification procedures "is the better practice because it eliminates the risk of conscious or unconscious suggestion."[163] Yet the *Silva-Santiago* court noted that it had never held that failure to use a blind procedure required a finding of unnecessary suggestion, and, in the case at hand, the court relied on the lack of evidence that the administrators of the photo array signaled the identity of the suspect "or otherwise attempted to influence" witnesses in concluding the procedure was not unnecessarily suggestive.[164] Unfortunately, despite having just recognized the possibility of subconscious suggestion, the court failed to account for the subtle ways in which such unintentional signaling might influence witnesses without any evidence of the suggestion being available for the court to assess. In fact, this sort of subtle, difficult-to-detect, subconscious suggestion is the primary reason scientists have recommended blind procedures in the first place; researchers have generally and appropriately assumed that the vast majority of law enforcement officers who conduct identification procedures do so in good faith, but that an administrator who knows the identity of the suspect is likely to influence the outcome of the procedure through inadvertent signaling.[165]

Since *Silva-Santiago*, Massachusetts courts have continued to find non-blind administration of identification procedures not unnecessarily suggestive. In 2009, in *Watson*, the Supreme Judicial Court again declined to find non-blind administration of an identification procedure unnecessarily suggestive, stating there was no indication that the officer consciously or unconsciously conveyed his knowledge to the witness.[166] In 2011, in *Commonwealth v. Lewis*, the Massachusetts Appeals Court held a photo array was not unduly suggestive despite

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[162] *See id.* (citation omitted). Although *Meas* involved a showup and the *Silva-Santiago* holding applied explicitly only to photo arrays, the *Meas* opinion is revealing of the court's general reluctance to enforce any remedy for failure to follow what it recognized as best practices in *Silva-Santiago*. In fact, the *Meas* court's reliance on the intuitive, but scientifically unsound, notion that statements about a suspect's presence are minor transgressions because witnesses believe a suspect is present anyway represents a retreat from the wisdom of the court's reliance on science instead of intuitive fallacy in the earlier case. Promisingly, at least, the *Meas* court noted that, in accordance with the policies of the Middlesex County district attorney's office, the witnesses in the case had received forms advising them of the possible absence of the perpetrator and telling them they should not feel compelled to make an identification. *Id.* at 870. Ultimately, the *Meas* court noted that the warnings on this form tempered the effect of the officer's statement that the perpetrator was probably present. *Id.* at 873.

[163] Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 311 (Mass. 2009).

[164] *Id.* at 311–12.

[165] *See, e.g.*, Wells & Quinlivan, *supra* note 62, at 7–8.

[166] Commonwealth v. Watson, 915 N.E.2d 1052, 1059 (Mass. 2009).

the fact that the officer who administered the procedure knew which photograph depicted the suspect.[167] Citing *Silva-Santiago,* the court also observed there was no evidence the officer had communicated the identity of the suspect to the witnesses.[168]

The fact that the *Silva-Santiago* court relied on the lack of specific verification that police had attempted to influence the outcome of the procedure in holding the non-blind photo array not unnecessarily suggestive in that case is also particularly ironic in light of the court's separate determination that it would not require police to make any recording, written or otherwise, of identification procedures.[169] As researchers have argued for many years, obtaining evidence from actual cases, as opposed to experiments, of subtle suggestion from non-blind administrators is difficult precisely because most identification procedures are not recorded, on video or by any other means.[170] The *Silva-Santiago* court's failure to require that police make a record of identification procedures also reduces the effectiveness of its charge that police should elicit confidence statements from witnesses at the time of an identification. The very reason for taking contemporaneous confidence statements is that witnesses who have been exposed to suggestion are likely to have inflated post-suggestion certainty and inflated memories of their previous certainty. In the absence of a record of the pre-trial procedure, unless the administrator has a perfect memory of events that may have taken place months or years earlier, there will be no effective means to correct a witness's false memory of how confident she was at the time of the earlier identification.[171]

Finally, lower courts have interpreted *Silva-Santiago* narrowly as providing no requirement that police follow any particular set of procedures when conducting the most suggestive of identification techniques, the showup.[172] Although the Supreme Judicial Court has stated that showup identifications will be considered unnecessarily suggestive unless police have a "good reason" to conduct the one-on-one confrontation,[173] the court has taken a relatively permissive approach in its

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[167] Commonwealth v. Lewis, No. 09-P-592, 2011 WL 31083, at *1 (Mass. App. Ct. Jan. 6, 2011).

[168] *Id.*

[169] *See* Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 313 (Mass. 2009).

[170] *See* Wells et al., *Eyewitness Identification Procedures, supra* note 68, at 628.

[171] In cases in which there is clear evidence that a witness was less than unequivocally certain of a pre-trial identification, the Supreme Judicial Court has recently provided a significant new protection against the witness making an identification in the inherently suggestive circumstances of the courtroom, which are likely to inflate the witness's certainty. In *Commonwealth v. Collins,* the Court held that, in such cases, in-court identification will be disallowed unless there is a "good reason" for it. Commonwealth v. Collins, 21 N.E.3d 528, 536–37 (Mass. 2014).

[172] *See* Commonwealth v. Bethune, No. WOCR2012-01332, 2013 WL 3227611, at *4 (Mass. Super. Ct. June 11, 2013) ("Although law enforcement, with some encouragement from the courts, has, for example, adopted procedural safeguards to reduce the suggestivity in the presentation of photo arrays . . . in the context of one-on-one show-up identifications, the courts have relegated reliability (or excessive suggestivity) analysis to the backseat, preferring to focus on law enforcement expediency or 'necessity,' as the courts have deferentially defined that term." (citation omitted)).

[173] Commonwealth v. Austin, 657 N.E.2d 458, 461 (Mass. 1995).

evaluation of what constitutes an adequate justification for using a showup. In *Commonwealth v. Austin*, the court explained that "[e]xigent or special circumstances are not a prerequisite to such confrontations,"[174] and stated that, in deciding whether police have a "good reason" for a showup, courts should consider the nature of the crime and concerns for public safety, the "need for efficient investigation in the immediate aftermath of a crime," and the "usefulness of prompt confirmation of investigatory information."[175] Since *Austin*, the Supreme Judicial Court has made clear that the question of whether police have a good reason to use a showup does not turn on whether police could have used a more reliable identification procedure.[176] In the end, as one court recently observed, Massachusetts courts have "done little to curtail the practice" of one-on-one identifications.[177] As a consequence, police are generally free to conduct showups, and the limited holding of *Silva-Santiago* allows them to do so without issuing warnings or taking certainty statements.[178]

New York courts have also refused to characterize unquestionably unreliable procedures as unnecessarily suggestive. In *People v. Sanchez*, for example, an intermediate appellate court noted the New Jersey Supreme Court's recognition of the increased likelihood of misidentification when a witness views a second identification procedure at which the suspect is the only person to reappear from an earlier procedure,[179] but dismissed the issue with the conclusory observation that "this court has never rejected the procedure."[180] That the New Jersey court's conclusion was based on undisputed scientific evidence seems to have been

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[174] *Id.* (quoting Commonwealth v. Harris, 479 N.E.2d 690, 692 (Mass. 1985)).

[175] *Austin*, 657 N.E.2d at 461 (citing Commonwealth v. Barnett, 354 N.E.2d 879 (Mass. 1976)).

[176] *See* Commonwealth v. Martin, 850 N.E.2d 555, 561 (Mass. 2006).

[177] *Bethune*, 2013 WL 3227611, at *5.

[178] Although police in Massachusetts are generally free to conduct showups, an auspicious decision of the Supreme Judicial Court in December 2014 placed significant limitations on the government's authority to elicit an in-court identification when police fail to conduct a pre-trial identification procedure. Describing a first-time, in-court identification as potentially more suggestive than a showup, the court held that such evidence would be inadmissible unless there is a "good reason" for its admission. *See* Commonwealth v. Crayton, 21 N.E.3d 157, 166, 170–72 (Mass. 2014). Such "good reason[s]" might include cases in which the witness knew the defendant before the crime at issue and cases in which an arresting officer testifies only to confirm the defendant is the person she arrested. *Id.* at 170 (citation omitted). The decision is a dramatic rejection of the mainstream approach to the issue; the vast majority of states regularly allow witnesses to identify defendants in court for the first time. In fact, even states that have acknowledged the science and attempted to improve on *Manson* have tended to allow the practice. *See, e.g.*, State v. Hickman, 330 P.3d 551, 564, 568–71 (Or. 2014); State v. Hollenbeck, 838 N.W.2d 866, *5 (Wis. 2013); State v. Bridges, Nos. 05-11-2686 & 05-11-2687, 2014 WL 2957443, at *8–9 (N.J. Super. Ct. App. Div. July 2, 2014) (finding that *Henderson* does not restrict the use of a first-time, in-court identification, but holding that, when there has been no pre-trial identification procedure and other factors suggest unreliability, courts must grant a defendant's request for a lineup).

[179] *See* People v. Sanchez, 95 A.D.3d 241, 253 (N.Y. App. Div. 2012) (citing State v. Henderson, 27 A.3d 872, 900–01 (N.J. 2011)).

[180] *Id.*

unimportant to the New York court. Likewise, despite its conclusion that failure to use blind administration for a lineup rendered the procedure "deficient," a New York trial court recently held the evidence should not be excluded as unnecessarily suggestive, noting that New York courts have repeatedly declined to hold that failure to use blind procedures requires suppression.[181]

In at least one case, a New York family court, presiding over a juvenile delinquency proceeding, relied in part on a detective's failure to warn a witness about the perpetrator's possible absence from a lineup in concluding the procedure was impermissibly suggestive.[182] However, the New York Court of Appeals has never made such a ruling. And although the Court of Appeals has stated that showups with civilian witnesses at police stations should generally be suppressed in the absence of exigent circumstances,[183] the court has otherwise failed to provide detailed guidance to law enforcement on the kinds of procedures it is likely to find unnecessarily suggestive and inadmissible as evidence.[184] Furthermore, unlike the Supreme Judicial Court of Massachusetts, the New York Court of Appeals has never imposed any requirement that law enforcement agencies conduct identification procedures in any particular manner at all. Although the Supreme Judicial Court has repeatedly declined to use exclusion as a remedy for violation of its requirement that police issue appropriate warnings and take contemporaneous confidence statements, the mere existence of the requirement is likely to result in compliance in many instances, and, in fact, recent Massachusetts cases suggest that police have responded to *Silva-Santiago* by adopting the court's protocol.[185]

The forgoing analysis demonstrates the inadequacy of mere adoption of a per se exclusionary rule triggered by a finding of unnecessary suggestion. If courts

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[181] People v. Vizcaino, No. 4177/11, 2013 WL 718647, at *9 (N.Y. Sup. Ct. Feb. 27, 2013) (citation omitted).

[182] *See In re* Royan D., No. DXXXX/04, 2004 WL 784538, at *7 (N.Y. Fam. Ct. Mar. 29, 2004).

[183] *See* People v. Duuvon, 571 N.E.2d 654, 656 (N.Y. 1991).

[184] In some cases, the New York Court of Appeals has expressed disapproval of specific unreliable practices, but it has not made clear that it would find such practices unnecessarily suggestive in isolation from other suggestive conduct. For example, in *Adams*, the court noted the suggestiveness of a showup at which police had informed witnesses that the men they would view were the suspected robbers. People v. Adams, 423 N.E.2d 379, 382 (N.Y. 1981). The court also observed that allowing witnesses to view the suspects as a group risked the possibility they would influence each other's decisions and held the showup was particularly unfair in the case because suspects were displayed together to witnesses. *Id.* However, the court did not state that any of these practices alone, and outside the context of a showup conducted at the police station several hours after the crime, would subject an identification to exclusion as unnecessarily suggestive. In fact, New York courts evaluating the admissibility of identification evidence since *Adams* have found showups including multiple suspects and involving simultaneous viewings by multiple witnesses not unduly suggestive. People v. Love, 443 N.E.2d 948, 949 (N.Y. 1982) (finding not impermissibly suggestive a showup identification at which a witness identified defendant in the presence of a group of other witnesses); *see also* People v. Alexander, 226 A.D.2d 548, 549 (N.Y. App. Div. 1996) (finding showup not unduly suggestive despite simultaneous viewing by two witnesses); People v. Colson, 148 A.D.2d 626, 626 (N.Y. App. Div. 1989) (finding showup not unduly suggestive despite police displaying defendants together).

[185] *See supra* text accompanying note 155.

applying the rule are unwilling to label procedures unnecessarily suggestive even when such procedures unequivocally increase the likelihood of misidentification and have no appreciable advantage over more reliable techniques, then the rule provides no protection to defendants facing the prospect of wrongful conviction through the introduction of unreliable eyewitness evidence. While this kind of decision-making may have been understandable in the years before the production of significant research establishing the ways the administration of identification procedures can affect reliability, it is difficult to fathom in an era in which courts have a conclusive body of research available to aid their determinations. It is particularly incomprehensible in a jurisdiction that has both expressed a desire to improve on *Manson* through use of a putatively more protective directive and that has explicitly recognized the validity of the science detailing the range of practices likely to result in misidentification.

The second major shortcoming of the *Stovall*-like approach Massachusetts and New York have adopted is that both states allow for the possibility of witness identification of the defendant in open court, even if the pre-trial identification evidence must be excluded as unnecessarily suggestive. The *Stovall* Court itself did not address whether a finding of unnecessary suggestion would require suppression of both pre-trial and in-court identification evidence, or, alternatively, whether in-court identification evidence might be adduced despite the need to suppress evidence from an unnecessarily suggestive pre-trial procedure.[186] As a result, courts applying *Stovall* were split on the issue.[187]

Although the *Manson* Court would make clear that *Manson* required a unitary approach to evaluating the admissibility of all identification evidence, the high courts of New York and Massachusetts have stated that in cases in which pre-trial identification evidence must be suppressed, in-court identification is nonetheless permissible if it is based on a source independent of the unnecessarily suggestive pre-trial procedure.[188] This poses at least two serious problems. First, the deterrent

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[186] *See* Rosenberg, *supra* note 25, at 265–66.

[187] *See id.*

[188] *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1260 (Mass. 1995); *Adams*, 423 N.E.2d at 382. Brandon L. Garrett has observed that a large number of states have adopted independent source tests that allow for the admissibility of in-court identification evidence even when pre-trial eyewitness evidence is excluded. Garrett, *supra* note 135, at 477. However, in states that purport to follow *Manson*, this formulation is almost incoherent and should virtually never actually lead to suppression of pre-trial evidence and admission of in-court identification evidence. This is so because, if analysis of *Manson*'s reliability factors leads to the conclusion that pre-trial evidence must be suppressed as unreliable, analysis of those same factors should lead to the conclusion that any in-court identification must also be excluded. In fact, Professor Garrett acknowledges that it is rare to find an example of a court suppressing pre-trial evidence while admitting an in-court identification. *Id.* Garrett attributes this to the difficulty of excluding any evidence under *Manson*. *Id.* In fact, given the near conceptual incoherence of excluding pre-trial evidence while admitting in-court identification evidence under *Manson*, the phenomenon may be more rare than Garrett acknowledges; in three of the four examples Professor Garrett offers of pre-trial evidence being excluded while in-court identification was allowed, the result was achieved only because the jurisdiction did not, in fact, apply *Manson*'s reliability factors to the pre-

value of per se exclusion is severely diminished if the prosecution may nonetheless introduce in-court identification evidence. Second, in most cases in which there has been a suggestive pre-trial procedure, it is extremely difficult to know whether a witness would have been able to identify a defendant in the absence of exposure to previous suggestion.

In *Manson* itself, the Court stated that a per se exclusionary rule for unnecessarily suggestive identification procedures would provide greater deterrence than the totality-of-the-circumstances reliability test it ultimately endorsed.[189] Likewise, in rejecting *Manson*, the Supreme Judicial Court of Massachusetts expressed its belief that *Manson*'s totality-of-the-circumstances test for determining admissibility would provide insufficient deterrence against the use of questionable identification procedures.[190] Yet the notion that per se exclusion of tainted pre-trial identification evidence provides significant deterrence against the use of such procedures is dubious if the prosecution will still be permitted to introduce in-court eyewitness evidence. In general, it is the defense, not the prosecution, that is most likely to want to introduce evidence of unreliable pre-trial procedures, which can be an effective means of impeaching eyewitnesses.[191] Yet as long as the witness is still allowed to identify the defendant in the courtroom, the prosecution is likely to be quite satisfied with the result. As both scientists and Supreme Court justices have observed, "All the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"[192]

In fact, just as federal courts examining *Manson*'s reliability factors have tended to admit all identification evidence in most cases in which those courts found unnecessary suggestion in a pre-trial procedure,[193] courts applying a per se exclusionary rule to impermissibly suggestive pre-trial identification procedures have usually chosen not to exclude in-court identification evidence even when improper police procedures convinced those courts that pre-trial evidence should be suppressed. In New York, assessment of cases citing *Adams* between 1981 and 2009 revealed that, out of 250 cases considering suppression of eyewitness evidence, courts found pre-trial procedures unnecessarily suggestive in ninety-three cases, but ruled that in-court identification evidence should have been suppressed in only

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trial evidence at all, but was one of the jurisdictions that has rejected *Manson* in favor of per se exclusion for at least some unnecessarily suggestive pre-trial evidence. *See id.* at 477 n.124 (citing examples from Massachusetts, New York, South Carolina, and Wisconsin).

[189] Manson v. Brathwaite, 432 U.S. 98, 112 (1977).

[190] *Johnson*, 650 N.E.2d at 1263.

[191] *See* Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 249 (2006).

[192] Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original) (quoting LOFTUS, *supra* note 107, at 19).

[193] *See generally* Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4 (finding that federal courts have suppressed eyewitness evidence in only 18.05% of cases in which the court found an identification procedure to be unnecessarily suggestive).

eighteen of those cases.[194] Thus, even when these courts found that pre-trial evidence should be excluded, they permitted witnesses to identify the defendant in court more than eighty percent of the time.[195] An analysis of cases on Westlaw between the Massachusetts Supreme Judicial Court's 1995 decision in *Johnson* and 2009 revealed that, while fifteen of seventy-seven cases involving consideration of the admissibility of eyewitness evidence included a determination that pre-trial evidence was unnecessarily suggestive, courts ruled that in-court identification was improper in only seven cases.[196]

Overall, police in New York should have a good deal of confidence that, even if they use suggestive identification techniques courts will nonetheless permit witnesses to take the stand and identify the defendant. Although I examined a smaller set of Massachusetts cases, the results there suggest that police can usually expect in-court identification evidence to be admissible despite suggestive pre-trial procedures as well. Of course, these figures represent only those cases in which courts found the pre-trial procedure to be unnecessarily suggestive in the first place. As I have discussed above, courts in both New York and Massachusetts frequently find irrefutably flawed procedures not unnecessarily suggestive at all, thus paving the way for the prosecution to adduce all of the identification evidence at trial.

The close parallel between the frequency with which New York courts find that a witness has an independent source for an in-court identification and federal courts find that all identification evidence is reliable notwithstanding unnecessarily suggestive procedures should be unsurprising; New York courts applying an independent source test to determine the admissibility of in-court identification evidence have founded their analysis on the same reliability factors from *Manson* that federal courts use to decide the admissibility of all eyewitness evidence.[197] Yet, as described above, these factors are particularly ineffective determinants of reliability given the tendency of suggestive procedures to cause witnesses to have inflated levels of certainty and to have distorted perceptions of the quality of their opportunities to view the perpetrator and the degree of attention paid to the perpetrator at the time of the crime.

Promisingly, a New York trial court recently endorsed examination of a broader range of estimator variables at independent source hearings, in line with the New Jersey Supreme Court's findings in *Henderson*.[198] Nonetheless, the court's recommendation was merely to supplement, rather than to replace, the *Manson* factors and did not include guidance on the pernicious effect of suggestion on those

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[194] *Id.* at 194.

[195] *See id.* at 194, 211.

[196] *Id.* at 194–95.

[197] *See, e.g.*, People v. Williams, 222 A.D.2d 149, 153 (N.Y. App. Div. 1996); People v. Grant, 843 N.Y.S.2d 911, 913 (N.Y. Sup. Ct. 2007); *see also* People v. Carter, 457 N.Y.S.2d 695, 700–701 (N.Y. Sup. Ct. 1982).

[198] *See* People v. Chuyn, No. 2707/2010, 2011 WL 6187150, at *14–15 (N.Y. Sup. Ct. Dec. 31, 2011).

factors. Furthermore, while it is auspicious that a trial court has expressed a willingness to consider scientifically valid reliability factors, the New York Court of Appeals has not specifically endorsed any amendment to the traditional reliability test.[199]

In Massachusetts, the Supreme Judicial Court has adopted an independent-source test that should lead to superior results as compared with the *Manson* factors. In *Johnson*, the court approved of factors largely in line with the factors the *Wade* Court had discussed for determining whether an in-court identification could be considered independent of a Sixth Amendment violation. The *Johnson* court stated that judges considering whether to admit in-court identification evidence in the wake of finding that a pre-trial procedure should be suppressed as unnecessarily suggestive should examine: "(1) The extent of the witness' opportunity to observe the defendant at the time of the crime; prior errors, if any, (2) in description, (3) in identifying another person or (4) in failing to identify the defendant; (5) the receipt of other suggestions, and (6) the lapse of time between the crime and the identification."[200]

Because these factors do not include the dubious reliance on certainty or the witness's self-reported degree of attention at the time of the crime, there is less potential for a suggestive procedure to affect the subsequent reliability determination. Though a witness who has viewed a suggestive procedure is also likely to have an inflated memory of the quality of her opportunity to view the perpetrator at the time of the crime, opportunity to view is more susceptible to objective evaluation than purely subjective self-reporting factors like degree of attention and certainty; some aspects of the witness's opportunity to view the criminal, like lighting conditions and distance, will, in some cases, be objectively verifiable. Additionally, although witnesses exposed to suggestion tend to have subsequently inflated impressions of the overall quality of their opportunities to view the perpetrator, studies have shown that suggestion does not inflate witnesses' impressions of some factors related to the overarching inquiry, including the distance between the witness and the criminal.[201]

All in all, Massachusetts' independent source test is clearly conceptually superior to mere reliance on the *Manson* factors. Because the Supreme Judicial Court has placed less emphasis on subjective, self-reporting factors that are likely to be skewed by suggestion and, thus, to reinforce the most problematic identification procedures, one should expect, overall, more reliable decision-making than one would expect from a court applying *Manson*. However, the Massachusetts approach

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[199] The *Chuyn* court did note, however, that the Court of Appeals has generally endorsed "the need for courts to be cognizant of the rapidly evolving nature of scientific knowledge of factors affecting the accuracy of eyewitness identification . . . ." *Id.* at *15 (citing decisions addressing the admissibility of expert testimony on eyewitness identification).

[200] Commonwealth v. Johnson, 650 N.E.2d 1257, 1260–61 (Mass. 1995) (quoting Commonwealth v. Botelho, 343 N.E.2d 876, 882 (Mass. 1976)).

[201] *See* Douglass & Steblay, *supra* note 89, at 863–65.

still leaves much to be desired. Although the factors mentioned by the *Johnson* court do not include the most problematic aspects of the *Manson* test, the Supreme Judicial Court has not instructed lower courts to examine the range of estimator variables (such as stress, weapon focus, and cross-racial identification) that can affect reliability in considering suppression motions.

Additionally, although the court has taken some steps to guide juries on the possibility of misidentification once the evidence is deemed admissible, those steps were, until very recently, inadequate to apprise jurors of the kinds of issues they should take into account in assessing the strength of the evidence. The Supreme Judicial Court has stated that when eyewitness identification is an important issue at trial, courts should give an instruction to jurors "regarding the evaluation of eyewitness identification testimony" upon request by the defendant.[202] Furthermore, citing precedent from Utah, the Supreme Judicial Court has required the exclusion of any reference to certainty in the standard instruction as a factor juries should consider.[203] Yet mere omission of certainty from the standard instruction is insufficient given the court's determination that eliciting testimony from a witness on his certainty remains permissible,[204] given the great weight jurors are likely to place on a witness's confidence based on their own intuition,[205] and given the court's refusal in 2005 to require judges to include specific information about the dubious correlation between certainty and accuracy in the standard instruction.[206]

Fortunately, the Supreme Judicial Court, in a January 2015 ruling in *Commonwealth v. Gomes*, held that trial courts should inform jurors of the tenuous relationship between certainty and accuracy.[207] The court also ruled that a new model instruction should inform jurors that feedback is likely to influence witnesses' memories, that stress during an event impairs memory, and that a prior viewing of a suspect at an identification procedure can reduce the reliability of a subsequent procedure at which the witness views the suspect again.[208] Although the court is currently seeking comment on a provisional model instruction incorporating these data before it finally declares the instruction a model,[209] the court's citations to the scientific consensus on the issues it discussed suggest a high

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[202] Commonwealth v. Franklin, 992 N.E.2d 319, 331 (Mass. 2013) (citing Commonwealth v. Pressley, 457 N.E.2d 1119 (Mass. 1983)).

[203] Commonwealth v. Santoli, 680 N.E.2d 1116, 1121 (Mass. 1997).

[204] Commonwealth v. Cruz, 839 N.E.2d 324, 330 (Mass. 2005).

[205] *See, e.g.*, Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185, 189–90 (1990) (finding that mock jurors gave "disproportionate weight to the confidence of the witness"); Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, THE CHAMPION, Apr. 2005, at 15 (stating that "people tend to accept the testimony of a confident eyewitness as clear proof that the identified person is indeed the perpetrator").

[206] *Cruz*, 839 N.E.2d at 330–31.

[207] Commonwealth v. Gomes, 22 N.E.3d 897, 913 (Mass. 2015).

[208] *Id.* at 911–16.

[209] *Id.* at 916–17.

probability each of the reforms it included in its provisional model will be included in a new model jury instruction. Before *Gomes*, the court had never explicitly required incorporation of any of the non-intuitive but evidence-based research on system and estimator variables into Massachusetts jury instructions.[210] While the sort of detailed instruction *Gomes* contemplates is an inadequate substitute for suppression of unreliable evidence, it is certainly superior to the status quo in Massachusetts before January 2015. In contrast to the Supreme Judicial Court, the New York Court of Appeals has not required any special rules whatsoever for issuing jury instructions in accord with eyewitness science.

Finally, both Massachusetts and New York have encouraged the provision of information on the variables that affect eyewitness reliability to jurors in some cases through the use of expert testimony. The Supreme Judicial Court of Massachusetts has stated that trial judges generally have discretion to determine the admissibility of expert testimony on eyewitness identification, but that it may be an abuse of discretion to exclude such testimony in a case in which there is little or no evidence that corroborates the eyewitness's identification.[211] Similarly, the New York Court of Appeals held that "it is an abuse of discretion" for a trial judge to exclude expert testimony on eyewitness identification in cases in which the outcome "turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime."[212]

The decision to favor the admissibility of expert testimony in some cases represents a real improvement on the nearly unfettered discretion afforded to trial judges in most federal circuits and a large number of states.[213] It is a dramatic improvement over the rule of per se exclusion of such testimony in five states and one federal circuit,[214] and over the generally disfavored status of expert testimony

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[210] Massachusetts' intermediate appellate court did state in 1999 that judges should consider a request for an instruction on the unreliability of cross-racial identification "with a measure of favorable inclination to grant it." Commonwealth v. Jean-Jacques, 712 N.E.2d 1150, 1152 (Mass. App. Ct. 1999). Nonetheless, that Court has also tended to find denial of such instructions to be within the discretion of the trial judge. *Id.*

[211] *See* Commonwealth v. Bly, 862 N.E.2d 341, 360 (Mass. 2007) (citing Commonwealth v. Santoli, 680 N.E.2d. 1116, 1119 (Mass. 1997)).

[212] People v. LeGrand, 867 N.E.2d 374, 375 (N.Y. 2007).

[213] As of 2011, seven federal circuits, twenty-three state high courts, and two lower state courts had adopted an approach affording virtually unlimited discretion to trial judges on the issue. Vallas, *supra* note 2, at 116 n.137.

[214] As of 2011, Kansas, Louisiana, Nebraska, Oregon, Pennsylvania, and the Eleventh Circuit Court of Appeals had rules completely excluding expert testimony on the reliability of eyewitness identification evidence. *Id.* at 124. In 2012, however, the Oregon Supreme Court held that traditional ways of apprising jurors of the pitfalls of eyewitness identification (closing arguments, cross-examination, and generalized jury instructions) were inadequate, that many of the variables relevant to the issue are either outside the ken of the average juror or contrary to common intuition, and that the use of experts on the issue "may prove vital to ensuring that the law keeps pace with advances in scientific knowledge." State v. Lawson, 291 P.3d 673, 695–96 (Or. 2012).

on the issue in other jurisdictions.[215] Even so, these cases have not gone far enough to ensure that jurors will be aware of the numerous issues relevant to the reliability of eyewitness evidence that are outside the knowledge of the average person and, in some cases, are contrary to common intuition. Although the rulings of the high courts of both states increase the odds that jurors will be educated on the relevant science in some cases, they leave defendants without assurance of the admissibility of expert testimony in many cases in which it might prove crucial.[216]

What makes this standard particularly troubling is the courts' failure to recognize that the existence of corroborative evidence has no bearing on the jury's ability to understand the factors that affect the reliability of eyewitness evidence or on the underlying reliability of the eyewitness evidence in the case at hand. Although corroborating evidence increases the odds the defendant is actually guilty, it does not enhance the probative value of the eyewitness evidence in the case any more than a great deal of corroborative evidence would increase the trustworthiness of a psychic's pronouncement that he sensed the defendant was the actual perpetrator. The *Manson* Court itself implicitly recognized this distinction when it stated that corroborative evidence in the case played no part in its assessment of the reliability of the eyewitness identification evidence.[217] As Justice Stevens observed in his concurrence in *Manson*, although such additional evidence of guilt would certainly be germane to an appellate court's harmless error analysis, it is irrelevant to an initial assessment of the reliability and admissibility of eyewitness identification evidence.[218] In fact, notwithstanding the clarity of this reasoning in Stevens's opinion in *Manson* itself, courts applying *Manson* frequently cite the existence of corroborative evidence in holding that eyewitness evidence is or was admissible, as opposed to determining that its admission was harmless error.[219] I will discuss this sort of analysis in more detail below. In any case, Justice Stevens's logic is as pertinent to the consideration of the admissibility of expert testimony on

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[215] *See generally* Vallas, *supra* note 2, at 125–28 (discussing state court views on expert testimony regarding eyewitness identification).

[216] Massachusetts' decision in *Gomes*, of course, suggests that, in the future, jurors in that state will be apprised through instructions of important variables affecting eyewitness reliability even when they do not hear expert testimony on the issue. Commonwealth v. Gomes, 22 N.E.3d 897, 900, 916–18 (Mass. 2015). Nonetheless, jury instructions may be less effective than expert testimony for several reasons. State v. Clopten, 223 P.3d 1103, 1110 (Utah 2009). First, jury instructions issued "at the end of what might be a long and fatiguing trial, and buried in a large overall charge'" might be lost on juries. *Id.* (quoting Cohen, *supra* note 130, at 272). Second, such instructions might come too late to counteract the effects of testimony of a confident eyewitness the jury heard days before the issuance of instructions. *Id.* at 1110–11. Finally, even the most detailed instructions tend to deal with scientific evidence only in general terms, and may be less effective than expert testimony tailored to the facts of the case. *Id.*

[217] Manson v. Brathwaite, 432 U.S. 98, 116 (1977).

[218] *Id.* at 118 n.* (Stevens, J., concurring).

[219] Rudolph Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1101 (2003) (noting that the First, Fourth, Seventh, and Eighth Circuits include assessment of general corroborative evidence of a defendant's guilt in their analysis of the reliability of eyewitness identification evidence).

eyewitness evidence as it is to the determination of the admissibility of the eyewitness identification evidence itself.

Overall, Massachusetts and New York have improved somewhat on the federal approach to eyewitness law, but neither state has done enough to protect against the risk that juries will rely on suspect evidence to convict innocent defendants. Although per se exclusion of unnecessarily suggestive pre-trial identification procedures does not, in itself, offer significantly more protection against the possibility of wrongful conviction based on misidentification than the *Manson* standard, the high courts of both states have given at least some guidance on the kinds of procedures police should avoid. Nonetheless, this guidance has been limited. Beyond its determination that showups with civilian witnesses at police stations are generally unnecessarily suggestive,[220] the New York Court of Appeals has left courts to decide on an ad hoc basis whether challenged procedures are improper. The Massachusetts Supreme Judicial Court has stated that showups are unnecessarily suggestive unless police have a "good reason" for using the procedure,[221] and it has directed police to implement some research-based identification techniques.[222] Nonetheless, the Supreme Judicial Court has ultimately taken a permissive approach to evaluating showup identifications, and it has consistently refused to find failure to adhere to its required protocol for photo arrays to be unnecessarily suggestive. If courts are unwilling to find indisputably unreliable and unnecessary procedures to be unnecessarily suggestive, then a per se rule of exclusion for impermissibly suggestive procedures is of little use.

Moreover, even when courts in Massachusetts and New York do find procedures to have been improper and subject to exclusion, the potential admission of in-court identification testimony reduces the efficacy of the per se rule. In New York, the use of *Manson*'s reliability factors in this analysis makes it likely that courts will find that eyewitnesses exposed to the most suggestive procedures nonetheless have an independent basis for their in-court identifications; review of actual cases demonstrates that New York courts admit in-court identification testimony in the vast majority of cases in which they rule that a pre-trial procedure was improper. In Massachusetts, the Supreme Judicial Court's independent source factors are superior to the *Manson* factors, but the court has failed to supplement the test it derived from *Wade* with the variety of system and estimator variables scientists have identified as relevant to any reliability determination. Finally, although both states have expressed a preference for the admission of expert testimony in some cases, and although Massachusetts has now crafted a provisional model instruction incorporating valuable scientific research on eyewitness reliability, neither state has done enough to ensure juries will be aware of relevant system and estimator variables when they evaluate evidence that judges have

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[220] *See* People v. Duuvon, 571 N.E.2d 654, 656 (N.Y. 1991).

[221] *See* Commonwealth v. Austin, 657 N.E.2d 458, 461 (Mass. 1995).

[222] *See* Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 312 (Mass. 2009).

determined to be admissible. And, as noted above, even the use of detailed jury instructions and regular admission of expert testimony are imperfect substitutes for exclusion of tainted evidence. When judges fail to take all relevant science into account in adjudicating suppression motions, they abdicate their responsibilities to protect defendants from wrongful conviction through the use of unreliable evidence.

Ultimately, the fact that the high courts of Massachusetts and New York have eyewitness science on their radar, and that each court has expressed a desire to improve on the federal standard, is promising. There is reason to hope these courts will be receptive to further reform in the future. However, the ambivalence of these courts' commitments to science-based norms is apparent in their respective failures to incorporate the full implications of the results of the past generations of psychological data into their decision-making. This ambivalence is perhaps most apparent when juxtaposing the Massachusetts Supreme Judicial Court's requirements that police warn witnesses about possible perpetrator absence and take contemporaneous confidence statements with the court's refusal to impose any consequences for failure to adhere to the mandate. Unfortunately, this lukewarm dedication to improvement has been characteristic of several other jurisdictions that have attempted to address the problem of eyewitness misidentification as well.

### *B. Wisconsin*

Like Massachusetts and New York, Wisconsin has followed *Stovall* in adopting a per se exclusionary rule in interpreting the due process requirements of its constitution, and like those states, Wisconsin has received considerable praise for its efforts at reform.[223] In justifying its rejection of *Manson*, the Wisconsin Supreme Court invoked the previous decade of research demonstrating that eyewitness misidentification is the most common cause of wrongful conviction and that eyewitness testimony is "often 'hopelessly unreliable.'"[224] In so doing, the court also provided significant guidance to law enforcement on the best ways to administer an identification procedure.[225] Like Massachusetts, moreover, some Wisconsin courts have, in some circumstances, used the independent source test from *Wade*, which does not include reference to certainty, in determining whether a witness has an independent source for in-court identification in the wake of

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[223] *See, e.g.*, Kruse, *supra* note 10, at 689–90 (stating that Wisconsin "responded to the social scientific literature" in jettisoning the flawed federal test, and that Wisconsin's test is "well-designed to promote compliance with the internal written policies of local agencies"); Rago, *supra* note 138, at 430 (citing Wisconsin's approach as an example of "perfectly reasonable thinking" that Pennsylvania would be "well served to follow").

[224] State v. Dubose, 699 N.W.2d 582, 591–92 (Wis. 2005) (quoting Commonwealth v. Johnson, 650 N.E.2d 1257, 1262 (Mass. 1995)).

[225] *See id.* at 594.

exposure to unnecessary suggestion.[226] Furthermore, Wisconsin's legislature has passed a statute requiring law enforcement agencies to adopt written policies for conducting eyewitness identification procedures, directed that such policies must be designed to reduce misidentification, and specifically recommended use of blind administration, sequential presentation, and recording of identification procedures and their results.[227] Even before the legislature took action on the issue, the Wisconsin Attorney General's office had promulgated a model policy incorporating major recommendations by eyewitness scientists, including blind administration, warnings, recording of contemporaneous confidence statements, and preventing witnesses from viewing the same suspect in more than one procedure.[228]

Given the state supreme court's recognition of the unreliability of eyewitness evidence, the court's stated commitment to reducing wrongful conviction through eyewitness misidentification, and the explicit guidance from the court and from the legislature on some best practices for conducting identification procedures, one might expect high-quality judicial decision-making by Wisconsin courts. However, as with New York and Massachusetts, examination of recent opinions in Wisconsin reveals frequently disappointing results. First, Wisconsin's rule of per se exclusion applies only to unnecessarily suggestive, in-person, pre-trial showups and not to any other kind of identification procedure.[229] Thus, its effect is limited. Additionally, although the Wisconsin Supreme Court has implied that *Wade*'s independent source test might be the standard for evaluating the admissibility of in-court identification evidence in the wake of exclusion of evidence from an unnecessary showup, lower courts have, at times, continued to invoke the *Manson* factors as the proper measure of reliability even in these limited circumstances.[230] And, as in Massachusetts, even if the Wisconsin Supreme Court ultimately makes clear that *Manson* should not guide independent source inquiries in the wake of findings of unnecessary showups, or reliability inquiries in the wake of any impermissible suggestion, the *Wade* factors are insufficient, without further elaboration, to guide judges on the array of variables that impact reliability. Finally, Wisconsin courts have essentially disregarded legislative wisdom on best practices for conducting identification procedures, and when they have confronted that wisdom directly, they have discounted it as inconsistent with judicial precedent.

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[226] *E.g.*, *id.* at 596.

[227] WIS. STAT. ANN. § 175.50 (West, Westlaw current through 2015 Act 54).

[228] *See generally* POLICE EXEC. RESEARCH FORUM, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES 24–25 (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242617.pdf (discussing Wisconsin Attorney General's Office model policy).

[229] *See* State v. Hibl, 714 N.W.2d 194, 201 (Wis. 2006).

[230] *See, e.g.*, State v. Brown, No. 2008AP888, 2009 WL 305508, at *8–9 (Wis. Ct. App. Feb. 10, 2009) (stating that the *Manson/Biggers* factors "go to [the] reliability of an identification that follows an impermissibly suggestive out-of-court confrontation, such as a show-up").

The Wisconsin Supreme Court's decision in *State v. Dubose* in 2005 was full of promise for the future of the state's treatment of eyewitness evidence. In *Dubose*, the court invoked *Stovall* and stated that, because of the inherently suggestive nature of showup identifications and the demonstrated unreliability of eyewitness testimony, evidence from a showup would be inadmissible unless the showup was necessary.[231] The court went on to rule that showup identifications are unnecessary unless the police lack probable cause for arrest or police are unable to use more reliable procedures due to other exigent circumstances.[232] This alone represents greater protection against the use of the most suggestive identification procedure than that offered by the high court of Massachusetts, which has made clear that exigent or special circumstances are not necessary to justify a showup,[233] and by New York, which has limited only the use of stationhouse showups.[234] Additionally, the *Dubose* court stressed that, even if a showup is necessary, "special care must be taken to minimize potential suggestiveness."[235] Thus, the court stated that police administering showups should tell witnesses the perpetrator may or may not be present and should not present a suspect to a witness for identification more than once.[236]

However, since *Dubose*, the court has made clear that its ruling applies only to in-person, pre-trial showup identifications.[237] The *Dubose* court itself emphasized that it was not adopting the general rule of per se exclusion for all unnecessarily suggestive pre-trial procedures, but, rather, was endorsing per se exclusion only of unnecessary showups.[238] In 2006, in *State v. Hibl*, the court acknowledged that the *Dubose* court had relied "on research that potentially implicates all eyewitness identifications," but concluded the *Dubose* "court's holding was more circumspect," stressing again that *Dubose* applied only to police-arranged showup identifications and not to accidental confrontations.[239] Since *Hibl*, lower courts in Wisconsin have demonstrated the extremely narrow scope of *Dubose*. In *State v. Hollenbeck*, the Wisconsin Court of Appeals, the state's intermediate appellate court, held that

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[231] *Dubose*, 699 N.W.2d at 592–94.

[232] *Id.* at 594.

[233] Commonwealth v. Austin, 657 N.E.2d 458, 461 (Mass. 1995).

[234] *See* People v. Duuvon, 571 N.E.2d 654, 656 (N.Y. 1991).

[235] *Dubose*, 699 N.W.2d at 594.

[236] *Id.* This aspect of the court's decision has received considerable praise. *See, e.g.*, Thompson, *supra* note 9, at 632 (stating that, in contrast to most other state high courts, the Wisconsin Supreme Court "signaled to lower courts and the police that it would not tolerate practices that did not conform more closely to state-of-the-art practices proposed by reformers"). However, as later cases reveal, this portion of the court's opinion in *Dubose* seems to be as limited as other lauded components of the ruling. *See infra* note 239 and accompanying text.

[237] *See* State v. Hibl, 714 N.W.2d 194, 201 (Wis. 2006).

[238] *Dubose*, 699 N.W.2d at 594.

[239] *Hibl*, 714 N.W.2d at 201; *accord* State v. Simmons, No. 2010AP1540-CR, 2011 WL 1485419, at *3 (Wis. Ct. App. Apr. 20, 2011); State v. Lee, No. 2007AP1636-CR, 2008 WL 2745277, at *3 (Wis. Ct. App. July 16, 2008); State v. Denson, No. 2006AP398-CR, 2006 WL 3783244, at *5 (Wis. Ct. App. Dec. 19, 2006).

*Dubose* places no constraint on the admissibility of a showup-like identification at which a witness identifies the defendant for the first time in court.[240] Additionally, in 2013, in *State v. Wuerzberger*, the Wisconsin Court of Appeals stated that *Dubose* is inapplicable even to a photo showup, at which police present a witness with a single photo, as opposed to a live viewing of the suspect.[241] Thus, *Dubose* imposes no requirement that police have exigent circumstances or any particular need to show a witness only a single photo of their suspect, as opposed to using a lineup or a photo array. Using traditional due process analysis, the *Wuerzberger* court cited precedent from 1970 for the proposition that photo showups are not necessarily impermissibly suggestive.[242] Without further analysis of the suggestiveness of the procedure in the case, the court went on to hold that, even assuming the photo showup was impermissibly suggestive, the evidence was reliable.[243]

It is also certainly promising that Wisconsin's legislature has passed a statute requiring police departments to formulate written policies on eyewitness identification procedures to reduce misidentification and has recommended use of blind administration and documentation of each procedure and its results.[244] The passage of this statute has likely led to the improved design and administration of identification procedures around the state.[245] Yet its efficacy is reduced by both the legislature's failure to include any sanction whatsoever for noncompliance and by the courts' refusal to label noncompliance with these best practices as impermissibly suggestive.

There are several ways in which Wisconsin's eyewitness statute falls short. First, the text of the statute provides no direct sanction for police departments that fail to comply with its requirements.[246] Second, the substantive reforms mentioned in the statute are listed not as requirements at all, but merely as policies that law

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[240] State v. Hollenbeck, No. 2012AP2254-CR, 2013 WL 5311471, at *5–6 (Wis. Ct. App. Sept. 24, 2013) (quoting *Dubose*'s definition of a showup as an "out-of-court" procedure).

[241] State v. Wuerzberger, No. 2007AP2085-CR, 2008 WL 4057870, at *3 (Wis. Ct. App. Sept. 3, 2008).

[242] *Id.* at *4 (citing Kain v. State, 179 N.W.2d 777, 782 (Wis. 1970)).

[243] *Id.*

[244] WIS. STAT. ANN. § 175.50 (West, Westlaw through 2015 Act 54).

[245] *See, e.g.*, State v. Scott, No. 2011AP1285-CR, 2012 WL 6743528, at *2 (Wis. Ct. App. Dec. 27, 2012) (noting that the state's Department of Justice had developed protocols in response to §175.50).

[246] §175.50 (Westlaw). Like Wisconsin, most other states that have passed eyewitness statutes have failed to include sanctions for noncompliance. *See, e.g.*, W. VA. CODE ANN. § 62-1E-2 (West, Westlaw through 2015 Reg. Sess.) (requiring, inter alia, blind administration, warnings, and recording of witness certainty at the time of an identification, but including no provision for sanction in the event of noncompliance); People v. Faber, 974 N.E.2d 337, 349 (Ill. App. Ct. 2012) (finding that violation of Illinois statute regulating administration of photo arrays did not require suppression, given that statutory language did not require suppression as a remedy for noncompliance); Garrett, *supra* note 135, at 491–92.

enforcement agencies "shall consider."[247] Furthermore, unlike North Carolina and Ohio,[248] the Wisconsin eyewitness identification statute fails even to suggest to courts that noncompliance should be a factor in determinations on the admissibility of eyewitness identification evidence.

*State v. Scott* demonstrates the extremely limited effect of the statute. In that case, the defendant claimed his counsel was ineffective for failing to challenge the admissibility of identification evidence obtained as a result of a police officer's showing a witness photos from a photo array simultaneously instead of sequentially, failing to warn the witness the perpetrator's photo might not be among those in the array, and failing to take a contemporaneous statement of certainty from the witness, which was inconsistent with the protocols the state's Department of Justice had developed pursuant to the statute.[249] While the intermediate appellate court that considered the appeal might have noted simply that the Indiana police officer who conducted the identification procedure was not bound by Wisconsin's rules, it held, more broadly, that it could not find the procedures in question improper because the state supreme court had upheld similar procedures in 1978 and 1981.[250] Thus, failure to follow the statute's recommended procedures or the rules the Department of Justice adopted in response to the statute has been of no consequence to Wisconsin judges. In the only other Wisconsin case available on Westlaw to cite the state's eyewitness statute as of the summer of 2014, the Court of Appeals emphasized that the substantive policies recommended in the statute are not mandatory.[251] Ultimately, in addition to revealing the insubstantial effect of the statute on judicial analysis, *Scott* also further exposes the limited effect of *Dubose*; not only does *Dubose*'s rule of per se exclusion apply only to unnecessarily suggestive showups, but the state supreme court's requirements for conducting showups when they are necessary, including the provision of warnings, are inapplicable to judicial analysis of other identification procedures in the state, based on decades-old rulings inconsistent with eyewitness science.[252]

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[247] WIS. STAT. ANN. § 175.50(5) (Westlaw); *see also* State v. Drew, 740 N.W.2d 404, 407 n.3 (Wis. Ct. App. 2007) (observing that, although § 175.50 requires law enforcement agencies to adopt written policies and to consider certain model rules, it does not mandate the content of the written policies).

[248] *See infra* Part III.D.

[249] *Scott*, 2012 WL 6743528, at *2.

[250] *Id.* at *3 (citing State v. Mosely, 307 N.W.2d 200 (Wis. 1981); Powell v. State, 271 N.W.2d 610 (Wis. 1978)).

[251] *Drew*, 740 N.W.2d at 407 n.3 (observing that, although § 175.50 requires law enforcement agencies adopt written policies and to consider certain model rules, it does not mandate the content of the written policies).

[252] This should qualify significantly any enthusiasm for the notion that Wisconsin's Supreme Court has signaled to police that it will view failure to use best practices for eyewitness identification as unconstitutional. *See, e.g.*, Thompson, *supra* note 2, at 632 n.178 (stating that the Wisconsin Supreme Court "actually indicates that anything less than compliance with reform procedures is not likely to be viewed as constitutional").

Even when Wisconsin courts do find a pre-trial procedure unnecessarily suggestive, those courts are likely to admit eyewitness evidence using the *Manson* factors to determine reliability. Although some scholarship has described Wisconsin as modifying its independent source test to eliminate eyewitness certainty as a consideration,[253] the actual state of the law in Wisconsin is unclear. In 1997, in *State v. McMorris*, the Wisconsin Supreme Court stated that certainty was not a proper part of the independent source test for determining the admissibility of in-court identification evidence in the wake of a finding that pre-trial identification evidence must be suppressed as a result of a Sixth Amendment violation.[254] Rather, the court noted, the *Wade* factors should be used to guide that inquiry.[255] In *Dubose*, the court held that in-court identification might be allowed if based on an independent source, notwithstanding the need to suppress evidence from an unnecessarily suggestive showup.[256] In so ruling, the court cited *McMorris*.[257]

However, the *McMorris* court itself ruled only that the *Manson* factors should not be used to evaluate the admissibility of in-court identification evidence in the wake of a Sixth Amendment violation.[258] The logic of *McMorris* reasonably applies to a *Dubose* independent source evaluation as well. As the *McMorris* court noted, certainty at a pre-trial procedure is part of the *Manson* test because that test is meant to assess the reliability of the pre-trial evidence itself.[259] Yet the *McMorris* court stated that certainty in court is not relevant to a determination of whether an in-court identification is independent of a constitutionally inadmissible pre-trial procedure.[260] Citing *Wade*, the court observed that a witness who has already made an identification at a lineup is unlikely to "go back on his word later on."[261] This logic applies to consideration of whether in-court identification should be considered independent of an unnecessarily suggestive showup as well.[262] But despite the *Dubose* court's citation to *McMorris*, and despite the reasonable application of the *McMorris* court's logic to *Dubose*, the *Dubose* court did not explicitly state that the *Manson* factors should not guide independent source inquiries in the wake of a suppression of an unnecessarily suggestive showup. And while some courts applying *Dubose* have used the *Wade* factors to guide their

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[253] *See id.* at 628 (citation omitted).

[254] State v. McMorris, 570 N.W.2d 384, 392–93 (Wis. 1997).

[255] *Id.* at 393.

[256] State v. Dubose, 699 N.W.2d 582, 596 (Wis. 2005).

[257] *Id.*

[258] *McMorris*, 570 N.W.2d at 392–93.

[259] *Id.* at 392.

[260] *Id.* at 393.

[261] *Id.* (quoting United States v. Wade, 388 U.S. 218, 229 (1967)).

[262] Of course, one might point out that certainty at any suggestive pre-trial procedure is not a good indicator of the reliability of the pre-trial evidence either, given that the suggestion is likely to have influenced the witness's certainty at the procedure. However, this notion does not seem to have occurred to the *McMorris* court.

independent source analysis,[263] others have stated the *Manson* factors continue to govern that assessment.[264] Moreover, neither the *McMorris* court nor the *Dubose* court said anything that would cast doubt on the continued viability of the *Manson* factors as a gauge of the reliability of evidence obtained through the use of impermissibly suggestive identification procedures other than showups,[265] and nothing the Wisconsin high court has said since *McMorris* has indicated that *Manson* no longer governs reliability inquiries when defendants challenge any procedure other than a showup as unnecessarily suggestive.

Finally, as discussed above in my evaluation of the law in Massachusetts, even if the *Wade* factors were to govern all inquiries about the reliability and admissibility of identification evidence, this would be insufficient to safeguard against the use of unreliable evidence. Promisingly, the Wisconsin Supreme Court has noted other factors, including weapon-focus, stress, and cross-racial identification, that impact reliability.[266] The court expressly approved these factors as among those judges "may take . . . into consideration" in exercising a "limited gate-keeping function" in determining the admissibility of eyewitness evidence under the state's equivalent of Federal Rule of Evidence 403, which the court said could be a means of excluding some unreliable identification evidence even in the absence of state-arranged, unnecessarily suggestive pre-trial identification procedures.[267] However, the court has not formally added these factors to its independent source analysis under *Wade* and *McMorris* (and possibly *Dubose*) or to its reliability analysis under *Manson*.

To make matters worse, like many federal courts, Wisconsin courts applying the *Manson* factors have done so in ways that exacerbate the inherent flaws of that test. For example, in *State v. Wuerzberger*, the court focused on the witnesses' certainty that the defendant was the perpetrator when they encountered him at a jail after having already viewed the defendant's picture at a photo showup.[268] However, the evidence that certainty is likely to increase in the wake of exposure to suggestion makes reliance on such post-exposure confidence an extremely poor indicator of reliability. Of course, the suggestiveness of the photo showup itself was

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[263] *See, e.g.*, State v. Nawrocki, 746 N.W.2d 509, 522–24 (Wis. Ct. App. 2008) (finding a showup identification impermissible and directing the trial court to use the *Wade* factors to decide whether in-court identification was based on an independent source).

[264] *See, e.g.*, State v. Brown, No. 2008AP888, 2009 WL 305508, at *3 (Wis. Ct. App. Feb. 10, 2009) (stating that the *Manson/Biggers* factors "go to reliability of an identification that follows an impermissibly suggestive out-of-court confrontation, such as a show-up").

[265] Rather, the court distinguished *Manson/Biggers* from the inquiry necessary in the wake of a Sixth Amendment violation. *See McMorris*, 570 N.W.2d at 393.

[266] State v. Hibl, 714 N.W.2d 194, 202–03 (Wis. 2006).

[267] *Id.* at 205.

[268] State v. Wuerzberger, No. 2007AP2085-CR, 2008 WL 4057870, at *5 (Wis. Ct. App. Sept. 3, 2008).

likely to have distorted the witness's confidence even at that procedure.[269] But the *Wuerzberger* court credited the witnesses' certainty at a time when they had viewed not one, but two suggestive procedures, and their confidence was likely even further inflated.[270] In one recent case, the Wisconsin Court of Appeals refused to credit a witness's certainty on the stand after having viewed a showup procedure after the crime, stating, "[E]xpression of firm belief in court before the jury by the witness begs the question of how the witness came by that belief."[271] Yet, more recently, the same court, in assessing the reliability of identification evidence, gave credence to a witness's confidence of his identification of the defendant as the defendant sat at the defense table in court after failing to positively identify the defendant from a previous photo array.[272]

In evaluating challenged eyewitness evidence, Wisconsin courts have also been susceptible to the pitfall of using corroborative evidence to support the reliability of an eyewitness's identification, which Justice Stevens warned against in his concurrence in *Manson*.[273] In *State v. Scott*, the Court of Appeals asserted that the fact that the defendant's DNA was on a glove found at the crime scene was "an independent indicia of reliability for the identification"" at which the witness had selected the defendant from a photo array that deviated from statutory recommendations and the Wisconsin Department of Justice protocol developed pursuant to the statute.[274] As such, the court concluded that any challenge by defendant's counsel to the admissibility of the identification would have been unsuccessful.[275] As I have discussed above, and as Justice Stevens recognized, this sort of corroborative evidence certainly increased the odds the defendant was actually guilty, and it might be used to justify upholding a conviction despite a lower court's admission of tainted eyewitness evidence. However, the *Scott* court mentioned this corroborative evidence in examining the likely success of a motion to suppress identification evidence, based on its assessment of the reliability of that evidence itself.[276] The existence of corroborating evidence does not increase the reliability of suspect eyewitness evidence and should play no role in determining its admissibility. This sort of bootstrapping analysis increases the odds of wrongful conviction.

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[269] *See* Wells & Quinlivan, *supra* note 62, at 12 (citing research demonstrating that procedures in which a suspect stands out have an inflationary effect on certainty similar to post-identification confirming feedback).

[270] *Wuerzberger*, 2008 WL 4057870, at *5.

[271] State v. Cooper, No. 2007AP1424-CR, 2007 WL 4233004, at *6 (Wis. Ct. App. Dec. 4, 2007).

[272] State v. Lee, No. 2007AP1636-CR, 2008 WL 2745277, at *4 (Wis. Ct. App. July 16, 2008).

[273] Manson v. Braithwaite, 432 U.S. 98, 118 (1977) (Stevens, J., concurring).

[274] State v. Scott, No. 2011AP1285-CR, 2012 WL 6743528, at *2–3. (Wis. Ct. App. Dec. 27, 2012).

[275] *See id.* at *3.

[276] *See id.*

Like Massachusetts, Wisconsin's judiciary has endorsed the scientific research proving the kinds of system and estimator variables that can increase or decrease the odds of misidentification. In addition, the legislature has recognized the wisdom of these data, requiring law enforcement agencies to adopt written eyewitness identification policies and to consider using some of the demonstrated methods for reducing misidentification; the Wisconsin Department of Justice has developed policies incorporating these recommendations, and the result has surely been the use of more reliable identification procedures in many cases. But despite some of the sweeping language of *Dubose*, the Wisconsin Supreme Court has interpreted the scope of that decision extremely narrowly. Beyond the context of showup identifications, the court has left lower courts to apply outmoded, unsound precedent and intuition in evaluating the propriety of identification procedures, and it has failed conclusively to require lower courts to consider all of the estimator variables that increase the odds of misidentification when they assess the overall reliability of identification evidence. Wisconsin courts have also given extremely limited attention to the state's eyewitness identification statute, and when they have dealt with the statute directly, they have refused to incorporate its wisdom into their decision-making, instead relying on decades-old precedent to uphold scientifically flawed procedures. Unfortunately, in the final analysis, the flash of wisdom the state supreme court displayed in *Dubose* seems to have been the exception to the general rule of judicial abdication of duty in the realm of eyewitness evidence. This failure to incorporate all implications of incontrovertible science surely reduces the efficacy of the state's eyewitness statute and its Department of Justice protocols; police officers and prosecutors engaged in the often competitive enterprise of law enforcement will have less incentive to use best practices when the consequences of bolstering the confidence of witnesses and shoring up evidence against a suspect they believe to be guilty are unlikely to include exclusion of the tainted evidence.

### *C. Utah*

Utah has also abandoned the federal version of the *Manson* test, though unlike Massachusetts, New York, and Wisconsin, it has done so not through adoption of any *Stovall*-like rule of per se exclusion of unnecessarily suggestive pre-trial evidence, but, rather, through modification of the reliability factors used to decide whether identification evidence is admissible despite the use of an unnecessarily suggestive procedure.[277] Kansas subsequently followed Utah's lead and adopted the same test.[278] Utah's modification of its due process test for determining the admissibility of eyewitness evidence followed on the heels of an earlier decision in which the state supreme court had required use of the same modified reliability

[277] *See* State v. Ramirez, 817 P.2d 774, 780–81 (Utah 1991).
[278] State v. Hunt, 69 P.3d 571, 577 (Kan. 2003).

factors in jury instructions.[279] Like other states that have recognized the results of scientific studies on eyewitness identification, Utah has received considerable praise for its improved reliability factors.[280] Unfortunately, however, Utah's reform efforts never sufficiently addressed the wealth of scientific data that should inform eyewitness law in every jurisdiction. Furthermore, a recent Utah decision, the significance of which has not been recognized in the current body of legal scholarship, undermines even the relatively modest improvements the Utah Supreme Court did endorse.

In *State v. Ramirez*, the state's supreme court invoked the growing body of scientific proof that the *Manson* factors are a poor mechanism for assessing reliability.[281] The court reiterated its language from an earlier decision, stating that several of the *Manson* factors "are flatly contradicted by well-respected and essentially unchallenged empirical studies," and concluded that "the time has come for a more empirically sound approach."[282] This auspicious sentiment led the court to conclude that judges assessing state due process challenges to the admissibility of eyewitness evidence should use a new set of reliability factors, not including the witness's certainty, and incorporating consideration of the reduced reliability associated with cross-racial identification.[283]

*Ramirez* built on the Utah Supreme Court's earlier decision in *State v. Long*, in which the court had sought to ensure that jurors would have adequate information about the variables that can reduce eyewitness accuracy. In *Long*, the court ruled that Utah judges must issue an instruction, listing the same factors the court would later adopt for due process analysis in *Ramirez*, to guide jurors anytime defense lawyers request an instruction in cases in which eyewitness identification is a central issue.[284] Just as the *Ramirez* opinion provided a foundation for justifiable optimism that judges would use scientifically sound analysis in evaluating the admissibility of evidence, *Long* gave a real basis to hope that Utah would maintain and expand on its stated commitment to provide jurors with the tools necessary to gauge the accuracy of eyewitness evidence in cases in which judges choose not to suppress it.

Nonetheless, even taking *Long* and *Ramirez* at face value, the opinions were insufficient safeguards against contaminated and unreliable evidence. Primarily, neither case included detailed guidance on the range of system variables that scientists have identified as crucial to reliability. In fact, contrary to the psychological research, the *Ramirez* court said that an officer's statements to

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[279] *See* State v. Long, 721 P.2d 483, 492–93 (Utah 1986).

[280] *See, e.g.*, Thompson, *supra* note 9, at 607 (describing Utah's alteration of its reliability test as among the "path-breaking decisions" of courts that have improved state eyewitness law, which "should be applauded," but noting that "so much more is needed," even in states that have endorsed reform); Whitehead, *supra* note 10, at 649.

[281] *Ramirez*, 817 P.2d at 780.

[282] *Id.* at 780–81 (quoting *Long*, 721 P.2d at 491).

[283] *See id.* at 781.

[284] *Long*, 721 P.2d at 492–93.

witnesses before a showup that police had caught someone fitting the description of one of the robbers "may not of themselves be unnecessarily suggestive."[285] Neither case mentioned anything about the benefits of blind administration, identification procedures, or the issuance of warnings that the perpetrator may be absent and that investigation will continue even if the witness does not make a positive identification. No Utah case available on Westlaw since *Long* and *Ramirez* has discussed the advantages of these best practices for identification procedures either.

The court's treatment of estimator variables in *Long* and *Ramirez* was better. As noted above, the *Long* court stated that cross-racial identification was a factor courts should consider in assessing reliability.[286] Although *Long* and *Ramirez* failed formally to incorporate several relevant estimator variables into Utah's reliability analysis, including stress and weapon focus, both opinions did mention stress as a factor that reduces reliability. The *Long* court noted that a model instruction including a reference to stress would satisfy the court's requirements,[287] and the *Ramirez* court also considered stress relevant to one of the factors it had formally adopted, the witness's capacity to observe the perpetrator.[288] The court would later observe that "general cautions" about the effects of stress had become a standard part of instructions issued pursuant to *Long*.[289] However, neither opinion specifically required judges or juries to examine stress in assessing eyewitness evidence, and neither mentioned weapon focus at all.

In addition to the inadequacy of *Long* and *Ramirez* on their own terms, the Utah Supreme Court has more recently undercut the efficacy of those decisions with its opinion in *State v. Guzman*.[290] In *Guzman*, the court acknowledged that it had excluded certainty from the factors it had required in jury instructions and for judicial consideration of due process claims in *Long* and *Ramirez* respectively, but the court went on to hold that it would not violate state due process rights for judges to examine certainty in assessing the admissibility of eyewitness evidence or for juries to use an eyewitness's testimony about his certainty to gauge the overall reliability of the identification.[291] In so holding, the court emphasized that it had previously stated the list of factors it had promulgated was not exhaustive.[292] It is difficult to credit this reasoning as anything other than disingenuous; the entire point of the court's previous exclusion of certainty from the list of reliability factors was its acknowledgment of the questionable correlation between certainty and accuracy.[293] The *Guzman* court attempted to justify its ruling by noting recent

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[285] *Ramirez*, 817 P.2d at 784.
[286] *Long*, 721 P.2d at 489, 493.
[287] *Id.* at 494 n.8, 495.
[288] *Ramirez*, 817 P.2d at 783.
[289] State v. Clopten, 223 P.3d 1103, 1110 (Utah 2009).
[290] State v. Guzman, 133 P.3d 363, 366–67 (Utah 2006).
[291] *See id.* at 368.
[292] *Id.*
[293] *See* State v. Long, 721 P.2d 483, 490–93 (Utah 1986).

research that had shown, in the court's estimation, "a direct link between witness certainty and the accuracy of the identification."[294] However, the research the court cited noted only a moderately positive correlation between certainty and accuracy even under ideal conditions, and cautioned that, in the real world, with "less than pristine conditions, witness confidence is highly malleable and may be 'pushed around' in ways that weaken or destroy even the modest confidence-accuracy relation."[295] This caveat is particularly salient in light of the Utah Supreme Court's failure to delineate the administrative measures necessary to eliminate from identification procedures the kind of suggestion that makes certainty irrelevant to reliability, and given uncontradicted research showing that confidence remains "by far the most important consideration to jurors" evaluating eyewitness evidence.[296]

Promisingly, however, the court did rule in 2009 in *State v. Clopten* that there should be "liberal and routine admission of eyewitness expert testimony, particularly in cases where . . . eyewitnesses are identifying a defendant not well known to them."[297] In so ruling, the court reversed its previous presumption that expert testimony on eyewitness identification would be inadmissible,[298] dismissed any notion that jurors already understand the limitations of eyewitness evidence,[299] and emphasized that jury instructions and cross-examination alone are likely to be insufficient to assist jurors in spotting mistaken identifications.[300] The court also specifically stated that among the factors experts might explain to jurors are "the weak correlation between confidence and accuracy,"[301] the consequences of stress and weapon focus, [302] and "potentially suggestive police conduct."[303] Again, however, research demonstrates that expert testimony has only a limited effect on jurors' understanding of the reliability of identification evidence, and, in particular, does not enhance jurors' appreciation of the factors that make an identification procedure more or less suggestive. This research shows that such testimony is an imperfect substitute for effective judicial gatekeeping; yet, as I have discussed, the Utah Supreme Court has also failed to provide judges with comprehensive guidance on the kinds of suggestive techniques that reduce reliability.

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[294] *Guzman*, 133 P.3d at 368 (citing Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 622).

[295] Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 623.

[296] *Id.* at 624.

[297] State v. Clopten, 223 P.3d 1103, 1112 (Utah 2009).

[298] *Id.*

[299] *Id.* at 1106.

[300] *Id.* at 1110–11.

[301] *Id.* at 1109.

[302] *See id.*

[303] *See id.* at 1113 n.22.

### *D. North Carolina/Ohio*

Like Wisconsin and a number of other jurisdictions, North Carolina and Ohio have enacted statutory provisions that require law enforcement agencies to implement policies to reduce eyewitness misidentification. However, unlike other states, the North Carolina and Ohio statutes include consequences for noncompliance.[304] Specifically, both statutes require judges to consider noncompliance when adjudicating suppression motions,[305] and both require judges to instruct juries that they may consider noncompliance in evaluating the reliability of eyewitness evidence.[306] These definite repercussions for recalcitrance should provide a significant incentive for law enforcement agencies to ensure their personnel follow the detailed statutory guidance on how to conduct identification procedures. Additionally, although North Carolina and Ohio have each retained the *Manson* test for evaluating due process claims under their own constitutions,[307] one might nonetheless expect, given these statutory directives, that courts in North Carolina and Ohio would regularly avoid one of the common errors of judges applying *Manson*—failure to recognize flawed identification procedures as unnecessarily suggestive. However, the results have been mixed, even on this score.

First, the text of the eyewitness statute in North Carolina mandates that the administrators of identification procedures either be unaware of the identity of the suspect or, at least, that administrators use procedures to prevent themselves from knowing the placement of the suspect in an identification procedure and, thus, which participant the witness is viewing at any given time.[308] Ohio's law includes a similar requirement, but it allows for procedures in which the administrator knows both the identity and position of the suspect if using a blind procedure is impracticable.[309] In such cases, Ohio requires the administrator to provide a written explanation of the impracticability.[310] Among other safeguards, each statute also compels administrators to issue warnings to witnesses that suspects might not be

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[304] *See* Garrett, *supra* note 135, at 491–92.

[305] *See* N.C. GEN. STAT. ANN. § 15A-284.52(d)(1) (West, Westlaw through Ch. 266, excluding 240–41, 246, 258–64, of the 2015 Reg. Sess. of the Gen. Assemb.); *see also* OHIO REV. CODE ANN. § 2933.83(C)(1) (West, Westlaw through 2015 Files 1 to 10, and 12 to 24 of the 131st Gen. Assemb. (2015–16)).

[306] § 15A-284.52(d)(3) (Westlaw); § 2933.83(C)(3) (Westlaw).

[307] *See* State v. Rogers, 562 S.E.2d 859, 868 (N.C. 2002); State v. Bates, 850 N.E.2d 1208, 1209 (Ohio 2006).

[308] § 15A-284.52(b)(1), (c) (Westlaw).

[309] § 2933.83(B)(1) (Westlaw).

[310] § 2933.83(B)(3) (Westlaw).

present,[311] to take immediate confidence statements from witnesses at the time of their identifications,[312] and to record the results of identification procedures.[313]

The rules both states have provided in their eyewitness statutes have undoubtedly led to some improvement of the administration of identification procedures. Recent cases in which defendants challenged eyewitness evidence in North Carolina, for example, show that police personnel in those cases had often complied with many of the statutory requirements. In *State v. Wilson*, a case in which the defendant claimed a photo array was suggestive because officers failed to ensure his picture resembled his appearance at the time of the offense, failed to ensure fillers resembled the witness's description of the perpetrator, and used a photo of him that was smaller than others in the array,[314] the state's appellate brief makes clear that police had followed most of the eyewitness statute's rules, including blind administration of the procedure and provision of instructions to the witness about possible perpetrator absence.[315] Likewise, in *State v. Jenkins*, though the defendant objected that the detective who administered a photo array knew the defendant's picture was present in the array, the detective had prevented himself from knowing the location of the defendant's photo by using an array of shuffled envelopes to present the photos to the witness, in compliance with the statute.[316] In *State v. Slaughter*, the witness testified that the administrator of a photo array had warned him the perpetrator might not be present and stated he felt no compulsion to make an identification.[317]

Nonetheless, judicial reliance on the statutes has been insufficient to mitigate the deficiencies of *Manson*. First, the statutes address only system variables and do nothing to inform judges of the large number of estimator variables that affect reliability. Second, because the statutes require only that judges consider violations in assessing suppression motions, rather than requiring suppression, judges have tended to adhere to the general judicial proclivity to admit tainted eyewitness evidence, even while acknowledging flawed identification procedures. Third, the statutorily required jury instructions judges in North Carolina and Ohio have issued as alternatives to suppression have been too general to inform jurors effectively of the problems with identification evidence they must evaluate. As noted above, moreover, even if these jurisdictions revise their instructions to include greater detail, instructions remain an inadequate substitute for suppression.

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[311] § 15A-284.52(b)(3)(a) (Westlaw); Ohio's statute requires such warnings in cases involving a blind administrator, but the state does not seem to require the instruction when blind administration is impracticable. § 2933.83(B)(5) (Westlaw).

[312] § 15A-284.52(b)(12) (Westlaw); § 2933.83(B)(4)(a) (Westlaw).

[313] § 15A-284.52(b)(14) (Westlaw); § 2933.83(B)(4) (Westlaw).

[314] State v. Wilson, 737 S.E.2d 186, 188 (N.C. Ct. App. 2013).

[315] Brief for the State at 6, State v. Wilson, 737 S.E.2d 186 (N.C. Ct. App. 2013) (No. COA12-954).

[316] State v. Jenkins, No. COA12-1085, 2013 WL 1314191, at *3 (N.C. Ct. App. Apr. 2, 2013).

[317] State v. Slaughter, No. COA12-631, 2012 WL 6591496, at *4 (N.C. Ct. App. Dec. 18, 2012).

Finally, until December of 2015, when a revision to North Carolina's law became effective, both statutes applied only to live lineups and photo arrays, leaving the most suggestive identification procedures, showups and photo showups, ungoverned by any legislative wisdom that might constrain judicial decision-making.

Because the statutes in both states are designed to address only system variables, judges in North Carolina and Ohio are likely to ignore the array of estimator variables that judges in other jurisdictions routinely overlook when analyzing evidence under *Manson*. Furthermore, even with regard to system variables, a major shortcoming of both eyewitness statutes is the weak mandate of each law that judges merely consider violations in adjudicating suppression motions. In practice, judges assessing violations of the statutes have tended not only to admit the challenged evidence, but also to find that violations did not even amount to the impermissible suggestion necessary to satisfy the first prong of the *Manson* analysis. In North Carolina, in *State v. Howie*, the defendant challenged a photo array at which two officers who knew his identity as a suspect were present, and one of those officers responded to the witness's look of frustration after examining several photos by saying, "[A]ll we need you to do is just pick the person out who you saw crossing the parking lot."[318] In assessing the due process claim, the intermediate appellate court emphasized that violation of the eyewitness statute does not require a finding of impermissible suggestion, but, rather, only consideration of the violation.[319] The court then concluded the procedure was not impermissibly suggestive, despite the violation, because although officers who knew the suspect's identity were present, a blind administrator actually conducted the procedure, and the other officers could not see which photo the witness was viewing at any given moment.[320] Additionally, the witness claimed not to have heard the comment stating that the officers needed him to pick out the perpetrator.[321] Similarly, in *State v. Stowes*, the intermediate appellate court accepted the trial court's holding that the presence of an officer involved in the investigation violated North Carolina's eyewitness statute,[322] but the court also held the violation did not render the procedure impermissibly suggestive because a blind administrator actually conducted the array, and there was no evidence the officer involved in the investigation had done anything to suggest the identity of the suspect to the witness.[323] Of course, a primary reason for blind administration is that officers involved in a case might signal their knowledge to witnesses unintentionally, and such signaling might often be subtle enough that neither the officer nor the witness

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[318] State v. Howie, No. COA13-553, 2014 WL 1047373, at *5–6 (N.C. Ct. App. Mar. 18, 2014).
[319] *Id.* at *9.
[320] *Id.* at *11.
[321] *Id.*
[322] *See* State v. Stowes, 727 S.E.2d 351, 356–58 (N.C. Ct. App. 2012).
[323] *Id.* at 357.

would be likely to be consciously aware of it. Thus, the *Stowes* court missed an opportunity to condemn this sort of procedure as presumptively suggestive, whether or not any specific evidence of comments or gestures by the investigating officer is available in the record.

Courts in Ohio have also stressed that violation of the state's eyewitness statute does not require suppression and should not necessarily result in a finding of unnecessary suggestion.[324] In *State v. Simpson*, the Ohio Court of Appeals, Ohio's intermediate appellate court, found photo arrays not impermissibly suggestive,[325] despite violation of the state's eyewitness law through failure to use blind administration without any written explanation of why using a blind procedure would have been impracticable.[326] The court supported its ruling by stating that it would "defer to the trial court's assessment of credibility and conclusion that the officers did not in any way suggest Simpson's identity to any of the witnesses."[327] As a consequence of its determination that the non-blind procedures were not impermissibly suggestive, the court declined even to consider the overall reliability of the identification evidence.[328]

Yet just as there is unlikely to be evidence available of subtle, unintentional suggestion, the credibility of the administrator and of the eyewitness are beside the point when dealing with the possibility of subconscious signaling. These cases from North Carolina and Ohio reveal the serious shortcomings of the states' eyewitness statutes. Although the laws instruct courts to consider violations in adjudicating suppression motions, courts in both states that have dealt with actual violations have simply been incapable of comprehending the practical implications of the flawed procedures they have examined.

In addition to the ways in which statutory violation might inform a court's due process analysis, North Carolina has an alternative statutory basis for exclusion. According to a provision broadly targeting illegally obtained evidence, exclusion is required as a consequence of any "substantial violation" of a statutory section dealing with procurement of evidence, including the eyewitness law.[329] For egregious violations of the eyewitness statute, this could provide a basis for exclusion fully independent of due process analysis. Thus far, however, courts assessing requests for suppression have found violations of the eyewitness law not

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[324] *See, e.g.*, State v. Shaw, 4 N.E.3d 406, 419–20 (Ohio Ct. App. 2013); State v. Simpson, No. 25069, 2013 WL 1189227, at *14–15 (Ohio Ct. App. Mar. 22, 2013).

[325] *Simpson*, 2013 WL 1189227, at *15.

[326] *Id.* at *6.

[327] *Id.* at *15.

[328] *See id.* at *15.

[329] *See* N.C. GEN. STAT. ANN. § 15A-974(a)(2) (West, Westlaw through Ch. 175 of the 2015 Reg. Sess. of the Gen. Assemb.).

to be substantial, just as they have generally found such violations not to be impermissibly suggestive.[330]

The retention of the *Manson* test in both jurisdictions also means that even if courts do find identification procedures unnecessarily suggestive, they are likely to use flawed and incomplete analysis to conclude the evidence is nonetheless reliable and admissible. In some cases, North Carolina courts have, like federal courts, applied the *Manson* factors in ways that undermine even their limited potential for ascertaining the reliability of identification evidence. In *State v. Slaughter*, for example, the North Carolina Court of Appeals found identification evidence reliable despite initial identification from a showup-like viewing of surveillance footage, relying in part on the witness's statement at trial that he was "100 percent sure" of his identification.[331] Likewise, Ohio courts have recently gauged reliability in response to challenges to allegedly flawed pre-trial identification procedures by measuring witnesses' certainty at trial.[332] Thus, the requirement in each state's statute that lineup administrators take contemporaneous confidence statements does not seem to have led judges to stop measuring confidence after witnesses have been exposed to suggestion, when that very suggestion is likely to have artificially inflated their certainty. Furthermore, the retention of *Manson*, coupled with the failure of either statute to address estimator variables, means that courts in both states are unlikely consistently to consider the large number of variables beyond the *Manson* factors that impact reliability.

The alternative sanction to suppression under each of the statutes, issuance of a jury instruction, is also inadequate, particularly because of the generalized instructions on which both jurisdictions have continued to rely. Although each statute directs judges to instruct jurors that they may consider noncompliance in determining the reliability of eyewitness evidence, neither compels a detailed explanation of the ways in which various factors affect reliability.[333] Thus, jurors are

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[330] As of the summer of 2014, only two cases since passage of the eyewitness statute available on Westlaw and containing the word "eyewitness" had cited the general provision on suppression for substantial violations. *See* State v. Howie, No. COA13-553, 2014 WL 1047373, at *9–10 (N.C. Ct. App. Mar. 18, 2014) (finding presence at identification procedure of officers who knew suspect's identity and comment by one officer urging witness to pick out the perpetrator not to be substantial violations); State v. Stowes, 727 S.E.2d 351, 357–58 (N.C. Ct. App. 2012) (noting that provision on suppression for substantial violations requires timely motion, which defendant had not made, and finding presence of non-blind officer at identification procedure not impermissibly suggestive).

[331] State v. Slaughter, No. COA12-631, 2012 WL 6591496, at *3 (N.C. Ct. App. Dec. 18, 2012).

[332] *See, e.g.*, State v. Howard, No. 100094, 2014 WL 2167980, at *6 (Ohio Ct. App. May 22, 2014); State v. Griffith, No. 2008-P-0089, 2010 WL 759192, at *1, *8 (Ohio Ct. App. Mar. 5, 2010) (relying, in the wake of a showup identification, on witness's statement on the witness stand that he was "pretty positive" of his identification to find evidence reliable).

[333] Both statutes mandate only an instruction that jurors "may consider credible evidence" of noncompliance in assessing reliability. § 15A-284.52(d)(3) (Westlaw); OHIO REV. CODE ANN. § 2933.83(C)(3) (West, Westlaw through 2015 Files 1 to 10, and 12 to 24 of the 131st Gen. Assemb. 2014–15).

left to their frequently incorrect, commonsense impressions of identification evidence.

A recent Ohio opinion reveals this problem. In *Simpson*, the Ohio Court of Appeals approved of the trial court's failure to provide detailed guidance to jurors and of the generalized instruction to the jury that it could consider non-blind administration in assessing the identification evidence.[334] Though the court noted that the defendant had failed to request an alternative instruction at trial, it also emphasized that the judge's instruction complied with the requirements of the state's eyewitness statute.[335] In a concurrence, Judge Froelich stressed the deficiency of this generalized instruction and asserted that "the mere incantation that the jury may consider noncompliance is illusory; without additional information as to why that noncompliance is relevant, such an instruction has questionable force."[336] Judge Froelich also observed that the trial judge had undercut any minimal benefit the basic instruction on statutory violation might have provided by further instructing the jury that the identification procedures were in compliance with the state and federal constitutions.[337] Nonetheless, Judge Froelich concurred in the judgment because, unquestionably, the trial court had "complied with the law."[338] North Carolina's statutorily required jury instruction includes no more detail than Ohio's, and North Carolina courts have also issued minimalist instructions in response to claimed statutory violations.[339]

Beyond the issue of statutory violation, courts in Ohio have tended to issue pattern instructions that provide little more than a reminder of the burden of proof and a recitation of *Manson*'s reliability factors,[340] and North Carolina courts have tended to rely on highly generalized pattern instructions advising juries to use their common experience to assess the credibility and believability of all witnesses.[341] In the face of defendants' requests for more detailed guidance to juries, the North Carolina Supreme Court has affirmed the sufficiency of the minimalist pattern instruction.[342] Most recently, North Carolina's intermediate appellate court

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[334] *See* State v. Simpson, No. 25069, 2013 WL 1189227, at *11, *15 (Ohio Ct. App. Mar. 22, 2013).

[335] *Id.* at *15.

[336] *Id.* at *20 (Froelich, J., concurring).

[337] *See id.* at *20–21.

[338] *Id.* at *21.

[339] *See, e.g.*, State v. Wilson, 737 S.E.2d 186, 188 (N.C. Ct. App. 2013) (noting only that, in response to a claimed violation of § 15A-284.52, the trial court had instructed the jury that it "may consider what evidence [it] find[s] to be credible concerning compliance or non-compliance with such requirements in determining the reliability of eyewitness identification" (alterations in original)).

[340] *See, e.g.*, *Simpson*, 2013 WL 1189227, at *15 (stating that the trial court's instruction, which mentioned the *Manson* factors, was consistent with Ohio's pattern eyewitness instruction) (citing Ohio Jury Instructions, CR 409.05 (Rev. Aug. 15, 2012)).

[341] *See, e.g.*, State v. Watlington, 759 S.E.2d 116, 128–30 (N.C. Ct. App. 2014).

[342] *See* State v. Dodd, 412 S.E.2d 46, 49 (N.C. 1992); State v. Green, 290 S.E.2d 625, 633 (N.C. 1982).

reiterated that the state's supreme court had held the pattern instructions to be adequate and declined to rule on whether a defendant's case was distinguishable from the earlier cases, in which defendants had requested detailed instructions on witnesses' opportunities to view the perpetrator, based on the subtle and counterintuitive factors of which the defendant in the case at hand hoped to inform the jury.[343] The North Carolina court acknowledged the New Jersey Supreme Court's requirement of detailed guidance for juries in *Henderson*, but declined to adopt that court's reasoning, in part because there was no evidence in the record to support the validity of the variables the *Henderson* court endorsed.[344]

Additionally, although the Ohio Supreme Court favors the admission of expert testimony, at least in the limited class of cases in which an eyewitness's identification is the only evidence that connects the defendant to the offense,[345] North Carolina continues to use a purely discretionary standard for the admission of expert testimony on the issue.[346] Ultimately, neither state consistently ensures that jurors will have enough information to evaluate effectively the reliability of eyewitness identification evidence. And, as I have discussed above, even regular admission of experts and detailed jury instructions are imperfect substitutes for effective judicial gate-keeping through exclusion of tainted evidence.

Finally, whatever paltry influence the eyewitness statutes in North Carolina and Ohio have had on courts in those states has been limited further because, until recently, the language of both statutes referred only to lineups and photo arrays,[347] and courts in both states interpreted the laws as having no bearing on the administration of showups or of photo showups.[348] Ohio has enacted another statute requesting that its attorney general adopt rules for identification procedures, including showups, consistent with the statutory requirements for lineups and photo arrays,[349] but the state has no statutory requirement regarding the administration of showups or the ways courts should evaluate the admissibility of evidence derived from showups. Promisingly, North Carolina recently amended its

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[343] *Watlington*, 759 S.E.2d at 128–30.

[344] *Id.* at 129–30.

[345] *See* State v. Buell, 489 N.E.2d 795, 801–02, 804 (Ohio 1986).

[346] Vallas, *supra* note 2, at 143.

[347] *See* N.C. GEN. STAT. ANN. § 15A-284.52 (West, Westlaw through Ch. 266, excluding 240–41, 246, 258–64, of the 2015 Reg. Sess. of the Gen. Assemb.); OHIO REV. CODE ANN. § 2933.83 (West, Westlaw through 2015 Files 1 to 10, and 12 to 24 of the 131st Gen. Assemb. 2014–15).

[348] *See, e.g.*, State v. Bailey, No. COA12-558, 2012 WL 5864526, at *3–4 (N.C. Ct. App. Nov. 20, 2012) (holding that the state's eyewitness statute does not apply to photo showups, and assuming *arguendo* that the procedure was unnecessarily suggestive, finding the evidence reliable); State v. Rawls, 700 S.E.2d 112, 115–18 (N.C. Ct. App. 2010) (ruling that the eyewitness statute is inapplicable to showups); State v. Miller, No. 2011-L-111, 2012 WL 3156497, at *6–7 (Ohio Ct. App. Aug. 6, 2012) (stating that Ohio's eyewitness law "governs photograph and live lineup procedures but not single photograph identification," but finding that evidence should have been suppressed using traditional due process analysis).

[349] OHIO REV. CODE ANN. § 2933.831 (West 2010, Westlaw through 2015 Files 1 to 10, and 12 to 24 of the 131st Gen. Assemb. 2015–16).

statute to include rules for conducting live showups and prohibiting the use of photo showups.[350] Before this amendment, the statutory requirements, including that police provide witnesses with adequate warnings and take immediate certainty statements, had no effect on judicial analysis in either state when police resorted to the most suggestive techniques possible, and no effect on police conduct at all in North Carolina.

Overall, North Carolina and Ohio's eyewitness statutes have very likely led to statewide improvement of the way law enforcement officers in those jurisdictions conduct many identification procedures. It is clear, however, that these statutes have not led judges in those states to incorporate fully the last several decades of scientific research into their decision-making. By retaining the *Manson* standard in its entirety, courts in both states have also failed to take any serious independent initiative to improve standards for assessing eyewitness evidence.

### *E. Miscellaneous Incremental Reforms*

Other states have taken less sweeping measures, some of which I have mentioned briefly above, to improve the administration of identification procedures and their assessment by judges and juries. As I have discussed, several states have enacted eyewitness statutes that require law enforcement agencies to use reliable methods for conducting identification procedures. However, as is the case with Wisconsin's eyewitness statute, most of these laws have failed to provide even the weak sanctions for noncompliance that North Carolina and Ohio included in their laws.[351] Also, as I have discussed in the cases of New York, Massachusetts, and Ohio, some jurisdictions favor admission of expert testimony, at least in limited circumstances.[352] Beyond these rules, a few states have made piecemeal efforts to improve their eyewitness law in a variety of ways. In 2012, the Supreme Court of Hawaii required enhanced jury instructions based on model instructions from California and included reference to several estimator variables that reduce reliability.[353] The approved instruction, however, excludes any discussion of system variables and continues to instruct jurors to consider the eyewitness's certainty.[354] In 2005, the Georgia Supreme Court instructed trial courts to discontinue instructing jurors to consider certainty when they examine the reliability of

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[350] § 15A-284.52 (Westlaw).

[351] *See, e.g.*, W. VA. CODE ANN. §62-1E-2 (West, Westlaw through the 2015 Reg. Sess.) (requiring, inter alia, blind administration, warnings, and recording of witness certainty at the time of an identification, but including no provision for sanction in the event of noncompliance); People v. Faber, 974 N.E.2d 337, 348–49 (Ill. App. Ct. 2012) (finding that violation of Illinois statute regulating administration of photo arrays did not require suppression, given that statutory language did not require suppression as a remedy for noncompliance); Garrett, *supra* note 135, at 491–92.

[352] *See* Vallas, *supra* note 2, at 119–24 (surveying the jurisdictions that take this approach).

[353] *See* State v. Cabagbag, 277 P.3d 1027, 1038–39 (Haw. 2012).

[354] *Id.* at 1039.

eyewitness evidence.[355] However, Georgia continues to use the *Manson* test, including the certainty factor, to assess the admissibility of evidence when defendants make due process claims.[356] Crucially, at the time of these decisions, neither Georgia nor Hawaii had statewide reform policies for the administration of identification procedures that could enhance the diagnostic value of a witness's certainty.[357] Connecticut's Supreme Court has required the issuance of a corrective jury instruction in cases in which police fail to warn eyewitnesses the perpetrator might be absent from an identification procedure.[358] Finally, several states, including some I have discussed in this article, have acknowledged that, in rare circumstances, courts might use state equivalents of Federal Rule of Evidence 403 to exclude unreliable and prejudicial eyewitness evidence in cases not involving suggestive police conduct, while nonetheless failing to offer detailed guidance on the factors judges should consider in making such determinations.[359] These reforms represent the admirable sentiment that something should be done to reduce eyewitness misidentification, yet each is also even more meager than those I have discussed above.

### *F. New Jersey/Oregon*

In 2011, the New Jersey Supreme Court issued its decision in *State v. Henderson*, using the court's supervisory powers to direct police to use some best practices for conducting identification procedures and discussing a wide range of estimator and system variables courts should consider in adjudicating suppression motions and that should be included in detailed jury instructions. Specifically, the court invoked its supervisory powers to require police to record immediate confidence statements,[360] to avoid confirmatory feedback,[361] and to record witnesses' answers to questions about the content of any communications witnesses have had with anyone else about the identification.[362] While not explicitly invoking

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[355] Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005).

[356] *See* Wright v. State, 756 S.E.2d 513, 517–18 (Ga. 2014).

[357] *See* GA. CODE ANN. § 17-20-2 (West, Westlaw through 2015 Reg. Legis. Sess.); *How is Your State Doing?: Hawaii*, INNOCENCE PROJECT http://www.innocenceproject.org/how-is-your-state-doing/HI (last visited Jan. 20, 2016) (stating that Hawaii "has no statewide eyewitness identification reform policy"). Fortunately, Georgia recently passed legislation requiring compliance with best practices, including blind administration, instructions regarding potential perpetrator absence, and recording eyewitness confidence at the time of an initial identification. That legislation will take effect in July of 2016. § 17-20-2 (Westlaw).

[358] *See* State v. Ledbetter, 881 A.2d 290, 316–19 (Conn. 2005).

[359] *See, e.g.*, People v. Marte, 912 N.E.2d 37, 41 (N.Y. 2009) (speculating that "[p]erhaps other safeguards would be appropriate in particular cases, and we do not rule out the possibility that a court, in balancing probative value against prejudicial effect, may find some testimony so unreliable that it is inadmissible").

[360] State v. Henderson, 27 A.3d 872, 900 (N.J. 2011).

[361] *Id.*

[362] *Id.* at 909.

its supervisory powers, the court also found that non-blind administration can increase the odds of misidentification,[363] and it stated that police should issue warnings about possible perpetrator absence,[364] should construct lineups so that suspects do not stand out,[365] should use at least five fillers in lineups,[366] should include no more than one suspect,[367] and should avoid presenting suspects to witnesses on more than one occasion.[368] In addition to these system variables, the court determined that judges and juries charged with evaluating eyewitness evidence should consider a long list of estimator variables, including stress, weapon focus, race bias, and any suggestion from private actors.[369] While using Oregon's version of Federal Rule of Evidence 403 instead of due process, the Oregon Supreme Court responded to *Henderson* the following year by incorporating similar variables into the required analysis for judges considering the admissibility of eyewitness evidence;[370] like the *Henderson* court, Oregon also approved the use of detailed jury instructions in cases in which judges ultimately admit questionable eyewitness evidence.[371] Then, in 2013, the Supreme Court of Idaho followed suit, citing the decisions in Oregon and New Jersey and listing the system and estimator variables those courts had discussed to provide guidance to Idaho judges examining due process claims.[372]

The *Henderson* court held that defendants are entitled to a pre-trial hearing on the admissibility of identification evidence when they show some evidence of suggestion tied to a system variable.[373] Once a defendant has met this initial burden, the state has the burden of producing evidence that the identification was reliable, accounting for both system and estimator variables.[374] The defendant has

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[363] *Id.* at 897.

[364] *Id.*

[365] *Id.* at 897–98.

[366] *Id.* at 898.

[367] *Id.*

[368] *Id.* at 900–01.

[369] *Id.* at 904–10.

[370] *See* State v. Lawson, 291 P.3d 673, 686–95 (Or. 2012).

[371] *See id.* at 697.

[372] State v. Almaraz, 301 P.3d 242, 251–53 (Idaho 2013).

[373] *See Henderson*, 27 A.3d at 920. By requiring only evidence of suggestion, as opposed to unnecessary or "impermissible" suggestion, the *Henderson* court eliminated a significant hurdle to exclusion of unreliable evidence. *See id.* at 918 (describing the requirement of a finding of "impermissible suggestiveness" as a flaw in the *Manson* test). In contrast to the federal standard, any use of a showup should, for example, lead to the possibility of exclusion. All showups are suggestive, even if, as the United States Supreme Court has asserted, they might sometimes be necessary. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967). Likewise, the Oregon Supreme Court did not condition the possibility of exclusion under Rule 403 on a finding that suggestive identification procedures were unnecessarily or impermissibly suggestive. *See Lawson*, 291 P.3d at 688–89. On the other hand, the Idaho Supreme Court, while endorsing consideration of the system and estimator variables the *Henderson* court identified, has retained the threshold requirement of a finding of "impermissibly suggestive" procedures. *Almaraz*, 301 P.3d at 253.

[374] *Henderson*, 27 A.3d. at 920.

the ultimate burden to persuade the court of a "very substantial likelihood of irreparable misidentification."[375]

In an opinion issued the same day as *Henderson*, the New Jersey Supreme Court specified that, in limited circumstances, defendants would be entitled to pre-trial hearings on the admissibility of identification evidence even without suggestiveness related to system variables.[376] In the absence of state action, the court held, the defendant would be required to present evidence that an identification was made under "highly suggestive," rather than merely suggestive, circumstances.[377] The Oregon Supreme Court also contemplated exclusion of unreliable eyewitness evidence without state action, holding that it would be possible to use Rule 403 to exclude eyewitness evidence when only estimator variables made the identification problematic.[378] However, despite accepting the theoretical possibility, the court stated that it was doubtful that issues relating to estimator variables alone would be sufficient to support suppression.[379]

*Henderson* and the decisions it has inspired have justifiably received significant praise. As has been well documented, courts applying *Manson* without additional guidance have routinely made findings inconsistent with the overwhelming weight of scientific evidence. By incorporating that science into the factors judges and, in New Jersey and Oregon, juries must consider, courts in these states have made truly significant improvements on the federal standard for assessing eyewitness evidence. There is, accordingly, real merit in the notion others have expressed that *Henderson* should serve as a model for other states.

Nonetheless, the experience of other jurisdictions that have made attempts to improve their eyewitness law should qualify, to some extent, the enthusiasm with

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[375] *Id.*

[376] *See* State v. Chen, 27 A.3d 930, 942–43 (N.J. 2011).

[377] *Id.* at 943.

[378] *See Lawson*, 291 P.3d at 697. The allowance for the possibility of suppression of unreliable evidence without state action in New Jersey may not include cases in which only problems with estimator variables that reduce reliability without suggesting the identity of the suspect (e.g., poor lighting, cross-racial identification, stress, weapon focus, passage of time) are at issue, given the *Chen* court's focus on "suggestiveness." *See Chen*, 27 A.3d at 942–43. On the other hand, the *Henderson* court did assert that, in rare cases, judges could use Rule 403 to "redact parts of identification testimony." *Henderson*, 27 A.3d at 925. Although it did not examine the issue explicitly, perhaps the New Jersey Supreme Court would be willing to contemplate the possibility of exclusion of eyewitness testimony under Rule 403 in cases involving only estimator variables bearing on general reliability, without factors easily classifiable as suggestive. In rejecting a defendant's proposed rule limiting due process analysis to state or private suggestion, the United States Supreme Court noted that if the Court accepted that due process could be implicated without state action, there would be no reason to distinguish cases involving suggestion from cases in which eyewitness evidence was arguably unreliable for other reasons. *See* Perry v. New Hampshire, 132 S. Ct. 716, 727 (2012) ("There is no reason why an identification made by an eyewitness with poor vision, for example, or one who harbors a grudge against the defendant, should be regarded as inherently more reliable, less of a 'threat to the fairness of trial,' than the identification Blandon made in this case." (citation omitted)). Given the New Jersey Supreme Court's abandonment of a state-action requirement in *Chen*, it might find the *Perry* Court's logic compelling in a future case.

[379] *Lawson*, 291 P.3d at 697.

which scholars and lawyers have received *Henderson*. In those other jurisdictions, judicial pronouncements on the dangers of misidentification and seemingly wholehearted endorsements of scientific research have frequently been followed by failures to follow up on piecemeal reforms and, in some cases, by retreat from even the modest measures earlier opinions had adopted. *Henderson* is certainly a more sweeping reform than anything that preceded it. However, even that decision leaves significant room for judges to evade their responsibility to protect against the dangers of wrongful conviction.

It is still too early to predict with any certainty how lower courts will apply *Henderson*.[380] Yet language from *Henderson* itself exposes the potential ways future judges might avoid using scientific evidence to provide defendants with the full measure of protection against misidentification. In fact, the *Henderson* court concluded by asserting that suppression of eyewitness evidence should remain rare, and that, in most cases, cross-examination and jury instructions will be the only safeguards available to defendants who challenge tainted eyewitness evidence.[381] The Oregon Supreme Court qualified its ruling with a similar pronouncement.[382] As I have discussed, however, there is good reason to believe that even the best jury instructions will be incapable of fully dispelling the commonsense myths laypeople hold about the quality of identification evidence.

On remand, New Jersey's intermediate appellate court noted at least one way in which *Henderson* actually may provide less protection than New Jersey's interpretation of the requirements of the *Manson* standard.[383] Although the United States Supreme Court has never decided who bears the burden of persuasion on whether a suggestive procedure rendered identification evidence unreliable,[384] the New Jersey Supreme Court had previously required the prosecution to prove by clear and convincing evidence that identification evidence was "independent" of suggestive procedures.[385] Of course, a defendant in New Jersey could always rely

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[380] Although more than one hundred New Jersey opinions available on Westlaw had cited Henderson by late July 2014, the most recent opinions available at that time continued to use the previous law to evaluate challenged evidence. *See, e.g.*, State v. Carter, No. 10-01-0004, 2014 WL 3407897, at *9 (N.J. Super. Ct. App. Div. July 15, 2014). This is attributable to the *Henderson* court's determination that its ruling would apply only prospectively, except for the cases of Henderson and Chen. *Henderson*, 27 A.3d at 928.

[381] *See Henderson*, 27 A.3d at 928.

[382] *Lawson*, 291 P.3d at 697 ("[W]e anticipate that the trial courts will continue to admit most eyewitness identifications.").

[383] *See* State v. Henderson, 77 A.3d 536, 542 n.9 (N.J. Super. Ct. App. Div. 2013) [hereinafter *Henderson II*].

[384] In her dissent in *Perry*, Justice Sotomayor did state that the defendant bears the initial burden of demonstrating impermissible suggestion, but she did not address who bears the ultimate burden regarding reliability. Perry v. New Hampshire, 132 S. Ct. 716, 733 (2012) (Sotomayor, J., dissenting).

[385] *Henderson II*, 77 A.3d at 542 (citing State v. Madison, 536 A.2d 254, 265 (N.J. 1988)) (noting that the *Henderson* court stated the burden "remains" with the defendant, suggesting the court might not have believed it was altering the previous law on this issue).

alternatively on the federal due process standard, but review of the evidence would then presumably be subject only to *Manson*'s reliability test.

In 2014, New Jersey's intermediate appellate court also rejected the notion that *Henderson*'s principles prevent the government from forgoing pre-trial identification procedures altogether and allowed a witness to identify the defendant for the first time in court while the defendant sat with his counsel at the defense table.[386] The court in that case did at least suggest that judges must grant affirmative requests from defendants for a pre-trial lineup.[387] Similarly, despite acknowledging the similarities between such in-court identifications and showups,[388] the Oregon Supreme Court ruled in 2014 that first-time in-court identifications might continue to be permissible.[389]

Perhaps the most telling sign that unreserved jubilation remains unwarranted, even in New Jersey, comes from the subsequent history of *Henderson* itself. In describing the determinations the trial judge made on remand, the intermediate appellate court noted the judge had found the two-week delay between crime and identification in the case to be a "relatively short span."[390] Yet, despite the supreme court's citation in its landmark decision of a study noting significant increases in misidentification within two to twenty-four hours after an event,[391] the intermediate appellate court held the trial judge's finding to be adequately supported by the evidence.[392] In June of 2014, the New Jersey Supreme Court declined further review.[393]

## CONCLUSION

In considering the best approaches to eyewitness law, it is worth highlighting the distinction between directives that govern the way police collect eyewitness evidence and those guiding courts in evaluating its admissibility. Every state should implement clear rules requiring police to comply with best practices for the collection of eyewitness evidence. Doing so would reduce the rate of misidentification without diminishing the ability of eyewitnesses to make accurate identifications of perpetrators when they are present or significantly taxing law enforcement resources.[394] The precise manner in which courts should analyze eyewitness evidence, however, is less certain.

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[386] *See* State v. Bridges, Nos. 05-11-2686 & 05-11-2687, 2014 WL 2957443, at *8 (N.J. Super. Ct. App. Div. July 2, 2014).

[387] *See id.* at *9.

[388] State v. Hickman, 330 P.3d 551, 567 (Or. 2014).

[389] *See id.* at 568–71.

[390] *Henderson II*, 77 A.3d at 546.

[391] State v. Henderson, 27 A.3d 872, 907 (N.J. 2011) (citation omitted).

[392] *Henderson II*, 77 A.3d at 546.

[393] State v. Henderson, 91 A.3d 25 (N.J. 2014) (unpublished table decision denying disposition).

[394] *See* Wells et al., *Eyewitness Identification Procedures*, *supra* note 68, at 627–37.

In the past, I have argued that it is of paramount importance that courts incorporate eyewitness science into their evaluation of identification evidence and that once that has been accomplished, it is unclear whether a per se exclusionary rule in the wake of suggestive procedures or a totality-of-the-circumstances reliability test strikes the best balance between upholding the fundamental rights of criminal defendants and the legitimate societal interest in the admissibility of reliable evidence of guilt.[395] If courts applying *Henderson* and *Lawson* are able to use those decisions effectively to protect defendants against tainted evidence, the use of a totality-of-the-circumstances standard will have been vindicated. If, on the other hand, courts prove unable to apply those decisions to provide adequate safeguards, it will be time for the community of scientists, lawyers, and legal scholars to call in unison for eyewitness rules that severely limit the discretion of judicial decision makers. The most effective approach might involve rehabilitation of a *Stovall*-like per se exclusionary rule, but with extensive and non-exclusive lists of the kinds of conduct that deviate from best practices in conducting eyewitness identification procedures and a requirement of exclusion of both pre-trial and in-court identification evidence for any witness exposed to such procedures, as opposed to the "independent source" tests used by New York and Massachusetts to admit most in-court identifications even when pre-trial procedures were flawed. Given the often disappointing track records even of states that have expressed some commitment to using eyewitness science to guide the development of their law, such stringent means of defining and limiting the discretion of trial judges might prove necessary.

The aim of this article has not been to cast doubt on the possibility of meaningful reform of eyewitness identification law. The efforts of some states to reduce wrongful conviction by eyewitness misidentification have certainly led to some improvements in the collection and assessment of eyewitness evidence. Yet even in states that have implemented laws and policies with real potential, what has been done so far has been inadequate. Perhaps most discouraging, these states seem to lack the courage of their stated scientific convictions. Most have been unwilling to embrace the full consequences of the science they claim to endorse, and some have actually retreated from directives that held significant promise. Rather than patting themselves on the back, legislators and judges in these states should be striving to do more. The history of the handful of states that have made serious attempts at reform should also inform those interested in the development of the law in New Jersey and states that have followed its lead. While scholars have rightfully characterized *Henderson* as a landmark decision, the checkered results of legal reform in other states should serve as a reminder of the necessity of continuing refinements and constant vigilance against retreat from the scientific principles to which the *Henderson* court expressed allegiance. To some extent, legal

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[395] *See* Kahn-Fogel, *Beyond* Manson, *supra* note 28, at 303–10; *see also* Kahn-Fogel, Manson *and Its Progeny*, *supra* note 4, at 225.

innovation will always lag behind scientific developments. That disharmony is exacerbated, however, when lawmakers, lawyers, and judges abdicate their responsibility to seek truth and, instead, elevate folk wisdom, intuition, and common sense over verifiable data.